UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

EMERALD LOS ANGELES, LLC

And Case 21–CA–233024

WESTERN STATES REGIONAL JOINT BOARD
WORKERS UNITED/SEIU

Lisa McNeill, *Esq.*,
for the Acting General Counsel.
David S. Birnbaum, Esq.,
Allyson Werntz, *Esq.*,
for the Respondent.
Robert S. Giolito, *Esq.*,
Ira J. Katz, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried virtually using the Zoom for Government platform on February 8–February 11, 2021. The Western States Regional Joint Board, Workers United/SEIU (the Union or Charging Party) filed the charge on December 17, 2018, and the General Counsel issued the complaint on April 2, 2020. Emerald Los Angeles, LLC (the Respondent or Emerald) filed a timely answer denying all material allegations.

The complaint alleges the Respondent violated the National Labor Relations Act (the Act) in connection with the Respondent's purchase of Mediclean Linen and Laundry (Mediclean), whose production warehouse employees, employed through staffing agencies, were represented by the Union. Specifically, the complaint alleges the Respondent violated Section 8(a)(3) and (1) of the Act by: (a) engaging in a course of conduct designed to ensure only a minority of its workforce would be comprised of former unionized Mediclean employees in an attempt to evade its statutory obligation to recognize and bargain with the Union.; (b) discharging at least 37 bargaining unit employees; and (c) refusing to consider for hire and refusing to hire former Mediclean employees, including Ada Soto.[1] The complaint further

[1] Paragraph 12(a) of the complaint was amended at the hearing to delete the Angel del Jesus Castro

alleges that the Respondent took these and other actions without providing the Union with notice and an opportunity to bargain, in violation of Section 8(a)(5) and (1).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company, provides commercial health care linen services at its facility in Commerce, California, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of California. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Mediclean's operations and Union recognition

Mediclean, which the Respondent purchased in December 2018, serviced hospital linen and laundry. The facility had three types of laundry positions: soil sort, where dirty laundry was sorted and transported, the warehouse area where the laundry was washed and dried, and the finishing area where it was ironed and folded.

Anil Yalamanchi owned Mediclean until August 2017, when he sold his interest in the business to Krishna Surapaneni. Juan Carlos Motta was Mediclean's production shift supervisor/manager, and Ligia Lagos was the production lead. Hashem Ghafourian was Mediclean's chief engineer.

Starting in 2013 or 2014, Mediclean began using a staffing agency, Temporary Staffing Solutions (TSS) to staff and service its production workforce. TSS interviewed, hired, distributed paychecks, an oversaw training of the production employees. (Tr. 689–690.)[2] Motta and Ghafourian remained directly employed by Mediclean and were not serviced by TSS.

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and Francisco Ramirez, and to add Ada Soto.

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "R Exh." for the Respondent's exhibit; "GC Exh." for the Acting General Counsel's exhibit; "Jt. Exh." for joint exhibit; "GC Br." for the Acting General Counsel's brief; "R Br." for the Respondent's brief, and "CP Br." for the Charging Party's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited but rather are based my review and consideration of the entire record.

The bulk of Mediclean's work was as a subcontractor for Sedexo Healthcare. Carol Alesso from Sodexo told Yalamanchi that in order to get more Sodexo business, the plant would need to be unionized.[3] (R Exhs. 8, 29–32; Tr. 696.) On November 13, 2016, Mediclean and the Union entered into a labor neutrality agreement.[4] (GC Exh. 2.) On July 10, 2017, Mediclean signed a voluntary recognition agreement after a majority of employee signed authorization cards. The initial unit included "all full time and regular part time employees employed by the Employer at its facility in Commerce, CA." (GC Exhs. 3–5; Tr. 65.)

Bargaining began in August, after Yalamanchi had left Mediclean. Attorney Rich Falcone was the lead negotiator for the Respondent. Surapaneni also attended bargaining and Motta appeared for one session on the Respondent's behalf. Mahoney and Union Attorney Bob Giolito, and a bargaining committee of employees, including Concepcion Zarate, bargained on behalf of the Union. (Tr. 69–70.) During the course of bargaining, the parties agreed to exclude drivers, maintenance workers, managers, and supervisors from the bargaining unit. (Tr. 92–93, 109–110.)

Mediclean changed staffing agencies in September 2017, and began using Premier HR (Premier) instead of TSS. Mediclean had not been working with TSS for about six months prior to contracting with Premier. (Tr. 143.) Anthony Recinos was President of Premier. In September 2017, Recinos met with Surapaneni and told him Premier would process employees' payroll, provide workers' compensation insurance, and fill positions for Mediclean, but explained that any workers Premier sent had to follow Mediclean's work rules and schedules, and that discipline of the workers would come from Mediclean.[5] (Tr. 144–145.) Recinos described Premier's involvement with Emerald as follows: "[W]e processed the payroll for them, we provide them with workers' comp coverage through [professional employment organization] Diamond, and whenever they had openings, we would fill their openings for any - - any job openings they may have." (Tr. 141.) Premier did not have any authority over the supervisors or leads at Mediclean. (Tr. 153.) Mediclean did not ask Premier to submit employees to drug testing or the E-verify process. (Tr. 153–154, 356; 469.)

Aneyeli Ballesteros, a Premier employee, worked onsite at Mediclean. (Tr. 155.) Recinos described Ballesteros' role as follows:

> There was an onboarding process, there was rules and regulations that they had to go through and agree to and sign off on. Pretty much, they would walk the employees through the facility to let them know, hey, this is where you're going to be working. She made sure that people were in dress code due to the fact that there's a lot of belt - belts that can kind of attach to either clothing or jewelry, things like that. She made sure they were in uniform. You know, any - any pa - pay hour issues, they would go to her, and

[3] Alesso was later replaced by Tim Crimmins, who had a presence at Mediclean. Crimmins did not remain after Emerald purchased the facility.

[4] Yalamanchi did not know what a labor neutrality agreement was when he signed the document. (Tr. 706–707.)

[5] Motta and Ghafourian were serviced through Premier but continued to act in their same respective roles for Mediclean. Premier did not replace the Mediclean workers and they continued their work uninterrupted.

> then she would go to the company and say, hey, so-and-so is missing two hours or a day of - of pay, can we look into it? And then they would go back to her and let her know, hey, okay, this is - this is - was approved or it wasn't approved. Also, if there was any injuries, she would do the initial investigation, then report it to - to the office, and then we would get the workers' comp to go down there and do the investigation.

(Tr. 156.) Ballesteros did not have the authority to discipline or terminate employees, and she did not assign or evaluate their work. (Tr. 157–158.) A Premier payroll assistant, Jenny Diaz, also worked at Mediclean.

The Staffing Agreement between Premier and Mediclean, signed on September 18, 2017, provided that "associates" are hired as Premier employees, and Premier provides all wages, taxes, withholdings, workers' compensation, and unemployment insurance. With regard to Mediclean's responsibilities, the agreement states, in relevant part:

> 9. Mediclean Inc. will properly supervise Assigned Employees performing its work and the responsible for its business operations, products, services and intellectual property.
>
> 10. Mediclean Inc. will properly supervise, control, and safeguard its premises, processes, or systems, and not permit Premier HR employees to operate any vehicle or mobile equipment, or entrust them with unattended premises, cash, checks, keys, credit cards, merchandise, confidential or trade secret information, negotiable instruments, or other valuables without Premier HR prior written approval or as strictly required by the job description provided to Premier HR.
>
> 11. Mediclean Inc. will provide Premier HR associates with a safe work site and provide appropriate information training, and safety equipment with respect to any hazardous substances or conditions to which they may be exposed at the work site.
>
> 12. Mediclean Inc. will supervise, direct, and control the work performed by Premier HR associates, and assume responsibility for all operational results, including losses or damage to property or data in the care, custody, or control of a Premier HR associate. You agree to indemnify and hold us harmless from any claims or damages that may be caused by your negligence, and agree on behalf of your insurer(s) to waive all rights of recovery (subrogation) against us.
>
> 13. Mediclean Inc. agrees, for a period of 180 days from Premier HR associate last day on assignment with you, not to hire directly or use through another staffing firm without paying a liquidation fee of 15% of the Premier HR associate's expected annual compensation, unless otherwise agreed to by us in writing. This clause should not apply if terminating for cause and does not apply for rollovers.

(GC Exh. 22). Premier charged Mediclean a 30-percent markup of each employee's wage rate.

Premier's general employment agreement states that the worker "will be considered an employee of Premier HR" and the "[e]mployee's employment and compensation can be terminated at any time . . . at the option of Employee or Premier HR" and the "[e]mployee agrees

to abide by the policies of Premier HR." It provides that "employee's employment and compensation can be terminated at any time with or without cause or notice at the option of employee or Premier." Premier had its own policies, including harassment and substance abuse, and employees could be terminated for violating them. (R Exh. 3; Tr. 185–190.)

Neither TSS nor Premier were signatories to the voluntary recognition agreement and neither staffing agency participated in bargaining. The same is true for Sodexo—nobody from Sodexo signed the voluntary recognition agreement or participated in bargaining.[6] Bargaining continued through May 2018, but no contract was reached. In total, representatives from the Union and Mediclean met for about six bargaining sessions.

2. The Respondent's purchase of Mediclean

On December 10, 2018, Emerald purchased Mediclean's Commerce facility.[7] Emerald is owned by Highland Avenue Capital and Pacific Avenue Capital, private equity investment firms that purchase underperforming businesses with the goal of improving them. Christopher Sznewajs is the founder and managing partner of the investment firms and is Emerald's Board Chairman.[8]

Upon purchasing the Commerce facility, Emerald brought in new leadership. (Tr. 363.) Greg Anderson was Emerald's chief executive officer (CEO). Jaye Park was Emerald's President. Don Luckennbach was the chief operating officer (COO). Murray Smith was the vice president of operations and Joel Esquen, who worked for Mediclean up until its sale, was Emerald's operations manager. Glen McClaran was the chief financial officer. Nathaniel Ramirez was the director of human resources (HR), and starting in January 2019, Jose Zamora was the human resources generalist.[9] Sean Mageean was hired as the plant's general manager. He hired Alicia Silva as an operations manager on December 30, 2018. (Tr. 491.) Motta remained as the production supervisor.[10]

The asset purchase agreement between Emerald and Mediclean included a long-term lease of the Commerce facility, its equipment, and water rights. The staffing agreement between Mediclean and Premier was excluded and not assumed as an asset. Emerald also excluded the voluntary recognition agreement and the labor neutrality agreement. (Jt. Exh. 2; Tr. 340–343.) Sznewajs described his knowledge of the Union as conveyed by Surapaneni as follows:

[6] The Respondent contends that Crimmins was also a required party to bargaining based on Mahoney's inclusion of him in emails scheduling bargaining sessions. (R Br. 12, citing R Exhs. 1; Tr. 133–134). The record evidence, however, does not show Crimmins or anyone from Sodexo as a participant in bargaining.

[7] Mediclean had entities under it and locations other than the Commerce facility, the details of which are not material to this decision. For purposes of this decision, "Mediclean" refers to the Commerce facility.

[8] Highland and Pacific previously bought Campus Laundry, another entity owned by Mediclean, and retained the previous workforce. The workers were subjected to E-verify as a result of the purchase. (Tr. 394–396.)

[9] Zamora is sometimes referred to as the human resources manager.

[10] Sadly, Motta passed away from COVID-19.

> I would say it was ambiguous to the relationship. What we had been told, is that Krishna had not engaged with the Union in - for a period of several months. And it was - and I - and in his words, was not an issue. I don't - we didn't really know what that meant. But his - his view was, is he had not engaged in any active dialog with the Unions and - and the workforce was uninterested in being represented by Unions.

(Tr. 356–357.) Nobody at Premier was given prior notification about the sale of Mediclean to Emerald.

Mediclean operated on a customer-owned-goods (COG) model, which meant each hospital that Mediclean serviced owned their sheets and linens. Emerald uses a rental model by which a pool of hospital customers rents sheets and linens that can be used at any of the hospitals Emerald services. (Tr. 345.) When looking to purchase the facility in September 2018, management determined that much of the equipment needed to be replaced because it was in poor condition and was not dependable, energy efficient, or safe. Because of the change from a COG to a rental model, Emerald also determined the plant configuration and workplace flow needed to be changed. (Tr. 412–416, 487–488, 500–510.) Emerald also sought to change the customer base. (Tr. 346–347, 354–355.) The goal was to double the capacity from about 20 million pounds of linen annually to about 40–50 million pounds. (Tr. 416–417.)

Emerald workers are subjected to E-verify to ensure they are legally authorized to work in the United States. (Tr. 368.) In an email dated October 10, 2018, Smith emailed Luckenbach, Anderson, and Sznewajs, asking:

> 1) could we hire e-verified employees (from the existing group) without limitations on the number, if they have previously stated that they are opposed to being in a Union? I.E. 100% of the employees don't want to be unionized?
>
> 2) How many of the existing employees are estimated to be able to e-verify and are opposed to being in the Union i.e. how many employees might be eligible to work for Emerald Los Angeles?

As to the first question, Sznewajs responded:

> This is irrelevant. They are a union facility and a union remains should 50% of the go-forward relevant employees basse come from Dr. K. existing employee pass. the verify requirements I believe will be a significant inhibitor of hiring 50%.

To the second question, he responded:

> We do not know and have never been told who will pass verify. We should plan for the worse to be safe and assume a significant portion of the workforce is not going to be eligible.

He added:

> As a general point all must remember MediClean has a union. To remove a union the employees must go through a formal process. They do no currently have this in motion and it is not an option right now. Thus we are buying asset of a business with a union. Should 50% of the workforce that we hire come from outside of Dr. K's existing employee base then the union is not part of our facility. If 50% of the people that we hire were/are previously with the union (regardless of intention) the union automatically transfers to the new LA facility. Our intention is to grab the best employees that meet our strict work standards and criteria and can pass verify. The outcome of the union is not the driver of hiring decisions.

(R Exh. 9.)

On October 30, 2018, Encore (which was later rebranded to become Emerald) contracted with Laundry Design Group to facilitate a plan for the changes to the facility. (R Exh. 12–14, 17–18; Tr. 420.) The estimated cost was around $6 million. (R Exh. 13; Tr. 422.)

B. Emerald Begins Operations at the Facility

The new owners assembled a meeting with the employees on December 10, 2018. Luckenbach was the main spokesperson for the Respondent. Anderson spoke briefly first and welcomed the employees. Luckenbach then welcomed the employees and told them Emerald would be making improvements to the facility and the equipment. He said that some work would be moved to San Diego temporarily to allow them to make the improvements. He also said that Emerald did not staff its workforce through temporary agencies, and they would eventually be moving to a direct hire process, and he would let the employees know when that occurred and they would have an opportunity to apply. (Tr. 439.) One of the new owners informed the employees that nobody would be fired as a result of the change in ownership. (Tr. 244, 260–261, 281–282.)

Emerald continued operations at the Commerce facility without a hiatus. Emerald's production department consists of soil sort, washing, drying, and pressing the linens, and folding them for transport. In the soil sort department, the laundry is sorted by linen type and prepared for washing. After the laundry is washed, dried, and pressed, it is disinfected ironed, and folded. Completed linens go to the shipping department where drivers pick them up for delivery. (Tr. 407–409.)

1. Initial staffing and communications with the Union

The existing Mediclean managers and supervisors were initially offered consulting contracts to continue in the same positions they held with Mediclean. Some were later directly hired. The department leads also continued in their positions immediately after Emerald took over. (Tr. 558–564.) Approximately 83 bargaining unit employees continued working for Emerald with no hiatus. (Jt. Exh. 4.) Employees were not immediately offered an opportunity to apply directly with Emerald.

Despite its preference for direct hires, prior to Emerald taking over operations at the Commerce facility, it engaged two staffing agencies, Kamran HR and Link, to provide workers.

(Tr. 454.) For the week ending December 9, 2018, 16 employees from Link and another 13 employees from Kamran were sent to work at the Commerce facility. In the ensuing weeks, workers sent by Link and Kamran continued to work and receive overtime. (Jt. Exhs. 7, 8.) Emerald also started directly hiring employees. Six soil sort workers were directly hired in December, all to work on the morning shift. (Jt. Exh. 11; Tr. 455–460.) To prepare for the probability that many of the former Mediclean workers would not pass E-verify, Luckenbach stated, "We began a direct hire process, and we reached out to - to other agencies - temp agencies, that would E-Verify, and they provided us a direct hire program from them, if we liked the employees, we could keep them; if we didn't, it would be just like a normal temp agency." (Tr. 437.) He further testified, "We - we, you know, started bringing in some of the E-Verify temps to make sure we had people there, in the event that we did have an exodus, and kind of back ourselves up." (Tr. 442.) Luckenbach confirmed with Ballesteros a couple days after closing that Premier had not E-verified the Mediclean workforce.[11] (Tr. 443.)

The day of the purchase, December 10, the Union's treasurer, Jack Mahoney, sent the following email to Emerald's President Park and CEO Anderson:

> Good morning. I am the Secretary-Treasurer of the Western States region of Workers United-SEIU, the labor union that represents the workers at Mediclean Linen & Laundry in Commerce, CA. Our union is engaged in collective bargaining with Mediclean.
>
> Earlier today, our members at Mediclean notified us that representatives of Emerald arrived to the plant and were introduced as the new owners of Mediclean. We would like to arrange to meet at your earliest convenience, to get to know each other and begin collective bargaining with the new ownership. The union can be available December 18, 19, 20, and 21.

(GC Exh. 6; Tr. 71.)

On December 11, one of the Respondent's attorneys, Brian West Easley, responded that Emerald did not assume any employee assets or liabilities of Mediclean, including its staffing agreement with Premier. Easley notified Mahoney that Emerald intended to hire new employees soon and would respond to his email after Emerald had hired "a substantial and representative complement of employees" to staff the facility. (GC Exh. 7.) The Union was not provided the opportunity to bargain over hiring new employees, and Mahoney did not hear from Easley or any other representative of the Respondent at any point thereafter. (Tr. 92.)

Turnover among hospital laundry workers is very high, particularly in the soil sort department, where employees deal with soiled hospital laundry. According to Zamora, it is not uncommon for new hires to go on break and never come back. He values employees who are familiar with the work because it alleviates concerns about their ability to handle the job. (Tr. 595, 626.) Sznewajs has observed that it generally takes four or more hires before an employee remains on the job. In Sznewajs' experience, when a laundry has a stable workforce that can

[11] Emerald was not sure whether Premier E-verified until they confirmed it with Premier. (Tr. 356.) Luckenbach said he was told during the due diligence that Premier did not E-verify the employees, but he did not state from whom he heard this information. (Tr. 443.)

meet the hiring standards, those employees will generally be hired, as operating with an experienced workforce is the best way to make money. (Tr. 362–364.) According to Luckenbach, the Respondent spends 30–45 days training workers on its production standards, so it would have been easier to continue to employ the former Mediclean workers than to hire new employees. (Tr. 411, 443) After an employee works 2–3 weeks, the chance they will leave is greatly reduced. (Tr. 365)

Ramirez sent Recinos an email on December 11 stating the following individuals, who were former Mediclean employees, were not needed and would be released at the end of their shift that day: Maria Hernandez, David Portillo, Lilli Lizarraga, Claudia Linarez, Concepcion Zarate, Maria Teresa Garcia, Teresa Sazo, Elida Arias, Rosalia Munoz, Guadalupe Garza, Mabelin Ramirez, Teresa Figueroa, Blanca Fuentes, Dolores Sanchez, Maria Hernandez, Vanessa De Jesus, Bertha Chiman Rodriguez, Mercedes Fuentes, and Elida Aju Yac.[12] (GC Exh. 24.) Esquen determined which workers to terminate, and his instructions to Recinos did not provide a reason for any employee's termination.[13] (Tr. 482.) Fourteen of these employees worked the morning shift. (Jt. Exh. 4, GC Exh. 26.) Luckenbach said they were terminated because of the work that was moved to San Diego, but he did not know how the terminated employees were selected and he did not specify what work was moved to San Diego or how it related to the work the terminated employees performed.[14] (Tr. 450–451.) Premier was not involved in the decision to release these workers. (Tr. 168.)

Several employees called Mahoney and told him about the bargaining unit employees' terminations. (Tr. 76.) Following the terminations, Recinos observed that many employees called Premier to resign because they "had seen the writing on the wall as Emerald was firing employees." (Tr. 203–204.)

The following day, December 12, Mahoney was informed that Emerald had hired about 20 new employees. (Tr. 76–77.) He sent an email to Recinos, demanding to bargain over the unilateral layoffs and transfer of work. Recinos responded the same day, stating that Premier was not replacing the employees, but Emerald instead was using two different staffing agencies.[15] Recinos also informed Mahoney that Premier did not have a contract with the Union, and any decisions regarding the Union had always come from Mediclean. (GC Exh. 9.)

Recinos found out about Mediclean's sale from Ballesteros. After Recinos left messages for Surapaneni and Esquen, a meeting was set up with Recinos, Esquen, and Ramirez on December 11. Recinos said they would need a new contract, and Ramirez instructed him to draw one up and present it to him.[16] (Tr. 163–164.) After the meeting, Ballesteros told Recinos that

[12] All of the discharged employees had worked for Mediclean through Premier HR.

[13] Unless it is specified in this decision, no reason was given for the terminations of the various former Mediclean employees.

[14] Nobody from Emerald gave even a rough indication of what work was moved to San Diego, how it related to the work the terminated employees performed at the Commerce facility, or how it related to the renovations at the Commerce facility.

[15] Mahoney learned that Emerald was using Link Staffing and Kamran HR.

[16] Luckenbach said Ramirez told him they never agreed to sign an agreement because of E-verify. (Tr. 444.)

Emerald had concerns about the E-verify process. On December 12, Recinos sent an email to Ramirez stating:

> I wanted to see if you had time today to meet with me so i can present the Agreement and benefits we provide and if I can clear up any concerns about the E verify process and everything thing else that was holding back the development of mediclean of what it could have been. I understand companies have partnerships with there staffing companies they have used in the past or are currently using. Unfortunately i was not kept in the loop of the sale date to give me a chance to try to present our services to Emerald but if you have time today i would greatly appreciate the opportunity. Thank you for your time

(GC Exh. 23.) Ramirez responded that he could meet with Recinos the following day. (GC Exh. 8.) On December 13, Recinos presented Ramirez with a staffing agreement. Ramirez told Recinos that Emerald did not want to sign an agreement and would operate on a week-by-week basis with Premier. Emerald did not ask Premier to send them any more workers after December 11. (Tr. 171.) Premier is willing and able to E-verify employees when the employer requests it, but Emerald did not make a request.[17] (Tr. 166, 196.)

On December 16, 2018, the Respondent posted job vacancies on Indeed.com for multiple production/warehouse jobs. (Jt. Exh. 9.) These job vacancies were not posted at the facility nor were employees made aware of them. (Tr. 551, 572.)

On December 16, Mahoney sent an email to Link demanding to bargain over the employees' wages, hours, and terms and conditions of employment. He also requested the names of the employees, their hire dates, classifications, and pay rates. (GC Exh. 11.) He did not receive a response.

On December 19, 2018, Mahoney sent Recinos an information request asking, "Who is the employer of the employees employed at the 'Mediclean' facility located at 450 Dunham Street in Commerce, CA?" Recinos responded as follows:

> We still have employees there as we dont know when the transition is finishing. I dont know the other 2 agencies as we no longer have onsite there and we are no longer replacing or sending any new temps to the facility. I dont know what good speaking to the agencies will do as none of the agencies have any power or decisions as it comes to company decisions. But that is the last I will be replying I've given you all info I have. me and you have the same info of what there planning to do and that is no information. Like I told you in my last email good luck in pursuing whatever it is you are pursuing against mediclean or emerald.

[17] Luckenbach testified that in a meeting with Mageean and Ballesteros, Ballesteros said Premier does not E-verify. (Tr. 464.) In his earlier statement about that meeting, he did not recall Ballesteros saying Premier does not E-verify. (Tr. 466.) Mageean did not testify about this meeting. I credit Recinos' testimony that Premier HR was willing to E-verify, as it was firsthand testimony corroborated by his December 12 email.

(GC Exh. 10.) He sent a nearly identical email to Link the same day but did not receive a response. (GC Exh. 12.)

On December 20, Mahoney emailed Kamran the same email he had sent to Link on December 16. (GC Exh. 13.) He sent a follow-up email on December 27 noting he had received no response, and asking, "Who is the employer of the employees employed at the facility located at 4500 Dunham Street in Commerce, CA?" (GC Exh. 14.) He received no response.

2. The remodel and staffing changes

The redesign and the new equipment installation was projected to take place, and ultimately did take place, with the plant still operating. (Tr. 423.) The proposed timeline to start the work was January 3, with completion by mid-April. 2019. (R Exh. 14.) The Commerce plant was scaled down to one shift to accommodate the work, and the plan was to move some of the work temporarily to San Diego. (Tr. 428–429.) Beginning in early January, Emerald received bills from San Diego hospitals for laundry services.[18] (R Exh. 22, Tr. 554–555.)

On January 4, the Respondent posted another Indeed.com ad for "10+" production workers. (Jt. Exh. 9.) Despite its professed scaling down of operations, Emerald continued to accept applications after the HR generalist, Jose Zamora, came on board on January 6, 2019. (Tr. 456.) Zamora posted E-verify posters in the lobby reception area shortly after he was hired. (R Exh. 15, Tr. 445, 681–682.) Mageean said the Mediclean workers were given preferential treatment for hiring because of their experience. (Tr. 537.) Even so, Zamora, at Ramirez' directive, focused on external hires in the beginning. Zamora did not know why he was initially instructed to focus on external hires rather than converting the current experienced employees. (Tr. 594, 666–667.) Zamora was responsible for E-verifying the workers who were offered employment. (Tr. 597–598.)

On January 8, 2019, Esquen directed Recinos to take .45 each day for the week ending January 6, 2019, for Oscar Rodriguez, Nelson Rodriguez, and Hector Vela. That same day Esquen told Recinos that Rodriguez had instructed him not to pay holiday pay for the following employees who did not work on January 1: Suli Guardado, Anel Campos, Eliza Barrios Carranza, Gensis Alviles, Ada Soto, Marie Nolasco, Walter Hernandez, Lizette Anguiano, and Sergio Menses. Esquen also instructed Recinos to tell the following employees their services were no longer needed: Esperanza Juarez, Vilma Platero, Mario Nolasco,[19] Everilda Lopez, Ada Soto, Ana Sandoval, and Maria Linares. Esquen informed Recinos how many hours each terminated employee was owed. (GC Exh. 15.)

On January 9, Esquen told Recinos that Emerald no longer needed the services of former Mediclean employees Virginia Geronimo, Angela Monzon, and Andrea Cervantes. On January 10, Esquen told Recinos to contact former Mediclean employees Maria Mercadao and Rosalba

[18] The January 3 start date lines up well with the invoices, and the invoice for work performed January 1–5 is $3696, while later weeks' invoices are higher. (R Exh. 22.)

[19] Mr. Nolosco was not included in the complaint. All of the other employees discharged on January 8 were former Mediclean employees.

Nolasco to tell them Emerald no longer needed their services. Esquen informed Recinos how many hours Mercado and Nolasco were owed. (GC Exh. 15.)

On January 10, 2019, Mahoney sent the following email to Anderson, Park, and Easley:

> As I've communicated previously, the Western States Regional Joint Board of Workers United-SEIU represents the employees at Emerald's facility in Commerce, CA.
>
> We have learned of further layoffs of employees we represent at your Commerce, CA facility. We understand Emerald directed Premier HR by email to layoff the affected employees. We request to meet at your earliest convenience about the layoffs and the unilateral changes that have caused the layoffs.

(GC Exh. 27.) He did not receive a response.[20]

On January 11, Esquen told Recinos to contact former Mediclean employees Laura Gonzales and Imelda Gonzales to tell them Emerald no longer needed them, and he conveyed how many hours each was owed. On January 13, Esquen told Recinos to inform former Mediclean employee Elias Monroy from the soil department that he was no longer needed and on January 13, he directed Recinos to tell former Mediclean employees Liliana Garcia that she was no longer needed. (GC Exh. 15.) Esquen directed Recinos to release the following former Mediclean employees on January 15, 2019: Yari Villalobos, Fany Reyes, Karla Gomez, and Andi Lomeli. Esquen informed Recinos how many hours each employee was owed. On January 16, he directed Recinos to tell former Mediclean employee Elisa Barrios she was no longer needed and informed him of the hours she had worked. (GC Exh. 15.)

Zamora began recruiting internal candidates around the second week in January. (Tr. 618.) Zamora said he hoped to hire all of the former Mediclean workers. (Tr. 625–626.) External recruiting also continued. Zamora conducted a job recruitment fair at a local hotel, and extended job offers to applicants in or around mid-January. (Tr. 596) The Respondent held a job recruitment fair on January 17, through the California Employment Development Department. (Jt. Exh. 10.)

According to Mageean, department heads were responsible for converting their workers to become Emerald employees. (Tr. 534.) By converting workers, Mageean meant, "just turning them over to HR and having them go through, you know, the E-verification process, filling out the paperwork, providing the correct documentation." (Tr. 567.) He recalled the drivers were the most vocal about converting, so he instructed Zamora to expedite them as quickly as possible. After the drivers were converted, Emerald moved to convert the production and engineering employees. (Tr. 567–568.) Mageean attended department meetings where employees were told they would be converted when time permitted. (Tr. 553.)

Zamora recalled things somewhat differently. He said that drivers were converted around the same time as production employees. (Tr. 625.) As for process, Zamora said the current

[20] Mediclean discussed termination decisions with the Union and provided the cause of the terminations. Some discussions resulted in terminations being reversed. (Tr. 112)

employees "would have to go through the same process as everybody else, which is apply, interview, the drug screen, and the E-Verification" with the ultimate goal of being hired directly with Emerald. (Tr. 624, 632.)

According to Luckenbach, the Respondent delayed accepting applications from the former Mediclean employees to avoid a mass exodus of employees who were afraid of being E-verified, because the holiday season was coming, and because the Respondent wanted to wait until the human resources manager was hired.[21] (Tr. 442, 456.) Mageean said the delay in accepting applications was because the Respondent did not have the time and did not want to effectively steal Premier's workforce. He did not recall any concerns about the former Mediclean employees and the E-verify process. (Tr. 535, 536.)

By January 18, the Respondent had hired 47 employees. (Jt. Exh. 11.) On January 19, Silva emailed Recinos and told him Emerald no longer needed former Mediclean employee Carmen Cortez' services and informed him of the number of regular and overtime hours she had worked. (GC Exh. 16.) On January 20, the Respondent posted another Indeed.com ad for "10+" graveyard-shift production workers. (Jt. Exh. 9.) On January 24, Silva emailed Recinos and told him Emerald no longer needed former Mediclean employees Gianinna Diaz and Anayelli Chavez, and told him the number of regular and overtime hours each employee had worked. (GC Exh. 17.)

On January 25, Zamora sent an email to Ramirez informing him that they had not received many applications from the soil sort employees, and they were giving them a deadline of January 31 to submit their applications. (R Exh. 25.) According to Zamora, the former Mediclean applicants who applied and saw the process through received offers, but some said they did not have the documentation for E-verify. (Tr. 633, 637.) On January 30, Silva instructed Recinos that Solaris Cortez had not shown up for work for 3 days, and when Silva reached out to her, she said she had resigned. (GC Exh. 18.)

Around January 30, the new washers became operational, and the new ironer was ready for use on February 15, 2019. (R Exh. 17.)

In February 2019, the Respondent directly hired 19 employees, 8 of whom were former Mediclean employees, and continued to post Indeed.com ads. On February 7, Silva instructed Recinos to terminate Obeth Reyes because he had not been to work in two weeks. (GC Exh. 19.) Former Mediclean employee Ramon Reyes was released on February 21 without explanation. (GC Exh. 20.)

In March 2019, the Respondent hired 40 employees, one of whom was a former Mediclean employee. (Jt. Exhs. 9, 11.) Workers from Link and Kamran continued to work and receive overtime. (Jt. Exhs. 7, 8.) On March 12, former Mediclean employees Jose Alfaro, Juan Serrano, Walter Hernandez, Ramon Gomez, Sergio Meneses, Pedro Isidoro, Hector Vela, Yuliza Mendez, Anel Campos, Nelly Huerta, Alma Caro, and Juan Silva were released with no reason

[21] The individual they were waiting on was Zamora, the HR generalist, who is sometimes erroneously referred to as the HR manager.

provided.[22] (GC Exh. 21.) The Union was not notified before any of the terminations discussed above.

In March, a new water system and new soil cart dumpers were installed and the dryer area was relocated. The refurbishment of a second tunnel washer had begun. Over the next couple of months new boilers were running, a water softener was installed, the soil sort barrier wall was removed, and a new conveyer system was being installed. The improvements were completed by June 2019. (R Exh. 17, Tr. 514, 580.)

The following former Mediclean employees applied for direct employment on the dates listed below:

Name	**Position Held**	**Date of Application**
Jose Alfaro	CBW Operator	1/26/2019
Maria Alvarado-Nolasco	Soil Lead	4/8/2019
Eliza Barrios Carranza	Production AM	1/28/2019
Anel Campos	Shipper AM	1/25/2019
Alma Caro	Shipper AM	1/25/2019
Nelly Huerta	Production AM	1/25/2019
Pedro Isidoro	Dryer Catcher AM	2/13/2019
Yuliza Mendez	Shipper AM	1/23/2019
Sergio Menses	Soil Lead	2/12/2019
Juan Serrano	Production AM	unknown
Juan Silva	Janitor	1/26/2019
Ada Soto	Production AM	4/8/2019

(Jt. Exhs. 4–5.) These employees were not re-hired.[23]

As of May 31, 2019, the Respondent had about 62 direct-hire employees in bargaining unit positions at the Commerce facility.[24] (Jt. Exh. 11.)

[22] Angel Castro, a supervisor, was also terminated by way of the same email. (Jt. Exh. 4; GC Exh. 21.)

[23] Elena Ortiz, whose job is listed as "Interview OM," applied with Emerald on January 29, 2019, and was not hired. It is unclear if her job falls within the bargaining unit.

[24] The Respondent, citing to R Exh. 26, states that there were 108 total hourly, non-supervisory employees at the end of April 2019. (R Br. 58.) There are problems with R. Exh. 26. The parties stipulated that Jose Alfaro, Anel Campos, Alma Caro Lopez, Ramon Gomez, Walter Hernandez, Nelly Huerta, Pedro Isidoro, Sergio Meneses, Juan Serrano, Juan Silva, and Hector Vela, worked at the Commerce facility immediately before and after the closing date. (Jt. Exh. 4.) Yet none of these employees appear on R Exh. 26, which purports to be employees who worked between December 10, 2018, and December 31, 2019. They were all terminated in March, which is likewise not reflected. In any event, I calculated the non-supervisors, non-drivers and non-maintenance employees who were hired before May 31 and either active or terminated after May 31, to come up with a figure of roughly 83 employees as of the end of May 2019.

Respondent's Exhibit 27 is likewise unreliable, as it shows the last "punch date" for these same employees as between February 1 and 5, 2019. Yet, the March 12 email specifically terminated them effective that same day. (GC Exh. 21.) Moreover, invoices contradict the information in R Exh. 27, as

C. Employee Testimony

Concepcion Zarate works for the Union as an external organizer. Prior to working for the Union, Zarate worked for Mediclean through TSS and Premier. She worked from January 2017 until her termination on December 11, 2018. Zarate served as part of the bargaining committee and attended about six bargaining sessions. Motta and Lagos assigned Zarate's work assignments. (Tr. 221–223.) If an employee wanted a day off, they could request it from Ballesteros, who would then check with Motta to see if the request was approved. (Tr. 231, 237.) When Zarate was laid off on December 11, 2018, Ballesteros did not tell her the reason, but told her a new company wanted to make a lot of changes. Zarate knew that Lagos and other Mediclean employees were hired by Emerald. Zarate did not file an application with Emerald. (Tr. 234–236.)

Andi Guadalupe Lomeli worked for Mediclean starting in 2017. She reported to Angel Castro and worked sorting dirty linens. Guadalupe's work and chain of command remained the same after Emerald took over operations. (Tr. 248–249.) Lomeli was present for the December 10 meeting. She recalled one of the new owners saying that there would be new equipment, but the employees should not be worried because everything would be okay with them. (Tr. 244.) Around 10–12 soil sort workers chose to quit shortly after Emerald bought Mediclean. She was unaware that Emerald intended to check work authorization papers. (Tr. 252.)

Ada Soto started working at Mediclean in 2014. She worked in production on folding machines and irons and reported to Lagos and Motta. She received her assignments from Lagos. She recalled being told at the December 10 meeting that nobody would be fired. (Tr. 260–261.) Soto's work and her chain of command did not change after Emerald purchased the plant. (Tr. 263–264.) Soto was discharged on January 8, 2019. (GC Exh. 15.) She knew some applicants who were unable to produce employment documents. (Tr. 271.) She applied directly with Emerald at the Commerce facility on April 8, 2019, and received help filling out the application from someone at the application site. Soto's application does not list her former employment with Mediclean from 2014–2019. She was not called for an interview. (GC 25; Tr. 264–266.) Zamora's notes say Soto declined to interview, but he testified he did not know what had happened with regard to her application. (R Exh. 28; Tr. 656.) Specifically, Zamora stated:

> Q . . . Do - do you recall why she's listed here as decided not to interview?
>
> A. Yeah. I mean, I believe when we were updating this information, I mean, some time passed. I - I couldn't remember what had happened with Ada. I did not remember her. I could not recall. In speaking with Nate, he didn't either. We asked managers and no one could remember exactly what happened. And since there were no specific notes on this individual, the only conclusion that we - that we came up with is that she decided not to interview.

(Tr. 656.)

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they show these employees working beyond February 5. (Jt. Exh. 6.)

Rosalia Munoz worked for Mediclean and then stayed on when Emerald purchased the facility. (Tr. 275.) She worked in the pillowcases area and reported to Anayeli Chavez, Motta, and Lagos. She recalled one of the new owners said nobody would be fired at the December 10 meeting. (Tr. 281–282.) Munoz received a text around December 11 saying she was being temporarily laid off because they were changing the machines. In January 2019, Motta told Munoz she could apply to work with Emerald, but she had another job at the time. (Tr. 293–294.) She applied at an undetermined date, but did not receive a response. (Tr. 297.) She applied to work at Emerald in June 2020 and was hired. (R Exh. 5; Tr. 285.) When she returned, the machines to fold the pillowcases and sheets were different, and the management team was different, but the rest of her work was the same. (Tr. 287, 295.)

Rosalba Nolasco started at Mediclean in November 2015. She worked in the sheets, pillowcases, and blankets area, and reported to Motta and Lagos. She received her work assignments from Motta and Lagos. (Tr. 300.) Nolasco continued to work at the plant after Emerald took over, until January 2019. Her work mostly stayed the same, but she was assigned to the washers a couple times and the lunch hour changed from ½ hour to an hour, and the break changed from 15 minutes to 10. (Tr. 302–303.) On January 10, 2019, Ballesteros texted Nolasco and told her there was no more work for her. Nolasco did not recall hearing that Emerald planned to E-verify its workers. (Tr. 306.)

Alejadrina Rojas started at Mediclean in 2016. She worked in the shipping department and received her assignments from Motta and Lagos. Her duties and chain of command remained the same after Emerald took over the plant. Lunch changed to 45 minutes and break changed to 10 minutes. Rojas resigned in mid-January 2019. (Tr. 310-–314.) She sent a text to Motta and Lagos saying that so many people were being fired, and she was afraid she would be fired, so she found a new job. (Tr. 315–316.) She said, "Once I noticed the trend of Emerald terminating the Mediclean employees and the new employees earn more, I began looking for a new job. I also began to look for a new job because my work in shipping was heavy and continuous work." (Tr. 318–319.)

III. Decision and Analysis

A. Successorship

Paragraph 5 of the complaint alleges that the Respondent is a successor to Mediclean. Specifically, the Acting General Counsel asserts that the Respondent is a successor under *NLRB v. Burns International Security Services*, 406 US 272 (1972).

In *Burns*, the Supreme Court affirmed the view that a mere change in ownership in is not such an "unusual circumstance" as to relieve the new employer of an obligation to bargain with its predecessor's employees. This is true where, as in *Burns*, the incumbent union's representative status was established by Board certification, but also where it was established by voluntary recognition accorded the union by the predecessor employer. See, e.g., *NLRB v. Dent d/b/a Chico Convalescent Hospital*, 534 F.2d 844 (9th Cir. 1976); *NLRB v. Frick Company*, 423 F.2d 1327 (3d Cir. 1970)*; Roman Catholic Diocese of Brooklyn* 222 NLRB 1052 (1976), enforcement denied in relevant part sub nom. *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977). A successor employer may have a bargaining obligation with a union even

though the union had never reached a collective-bargaining agreement with the predecessor employer. *Lockheed Engineering, Co*., 271 NLRB 119 (1984).

The Court in *Burns* was careful to safeguard "'the rightful prerogative of owners independently to rearrange their businesses.'" *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 182, (1973), quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964). If, however, "the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated. This makes sense when one considers that the employer *intends* to take advantage of the trained work force of its predecessor." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987) (Emphasis in original).

1. Employer status of Emerald and Mediclean

As a threshold issue, I must determine whether Emerald is an employer, and whether Mediclean was an employer. The Respondent contends that Premier was the employer of the bargaining unit employees when Emerald purchased the Commerce facility from Mediclean, and their employer did not change as a result of the sale. The Respondent cites to *Skill Staff of Colorado*, 331 NLRB 815, 815–816 (2000), to argue that staffing agencies are routinely found to be statutory employers. While it is true that staffing agencies may be considered employers in some cases, I am not deciding whether TSS, Premier, or any other staffing agency is also an employer in this case. I am merely deciding whether Emerald is an employer and Mediclean was an employer.[25]

It is abundantly clear from the multitude of emails Esquen and Silva sent to Recinos that Emerald maintained, and robustly exercised, the authority to terminate the employment of the employees working under the contract with Premier. Specifically with regard to terminations, the Board has held that where a "[r]espondent controls to a substantial degree a most significant aspect of the employment relationship of persons on the project" it "is an employer at least of persons . . . over whom it effectively exercises such control." *West Texas Utilities Co*., 108 NLRB 407, 414 (1954). Even without more, the exercise of termination authority rendered Emerald an employer, at least with regard to the employees it terminated.[26] In addition, Esquen and Silva's emails show they have the authority over other working conditions, including pay. Emerald likewise controlled employee lunch periods and breaks, as indicated by employee testimony that these were changed after the sale.

[25] Though there is not much guidance in Board law regarding staffing firms and how they impact employer status, the EEOC has published *Enforcement Guidance: Application of EEO laws to contingent workers placed by temporary employment agencies and other staffing firms*. While this guidance is not binding, it is useful, and sets forth various factors to indicate whether a worker is an employee of a staffing firm, the staffing firm's client, or both. EEOC NOTICE Number 915.002, December 3, 1997. See also *Freeman v. Kansas*, 128 F. Supp. 2d 1311, 1316 (D. Kan. 2001) (holding that temporary employment agency's client qualified as employer of the worker assigned to it for purposes of a Title VII retaliation claim); *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 611 F. Supp. 344, 348–49 (S.D.N.Y. 1984) (finding temporary employment agency's client was liable under Title VII because the client exercised sufficient control over the means and manner of the workers' performance).

When the Respondent took over the facility from Mediclean, Motta was retained and his oversight of the production employees did not change. Motta directed and supervised the production employees' work both for Mediclean and Emerald. Ballesteros had ancillary duties regarding the employees' pay and benefits, and was the conduit for leave requests, but she did not direct or oversee the actual work they performed on the plant floor for Mediclean or Emerald. See *Dynawash*, 362 NLRB 427, (2015) ("the respondent was *an* employer because it exercised sufficient control" over the employee's terms and conditions of employment) (Emphasis in original).

As to Mediclean specifically, the staffing agreement provided that Mediclean was responsible for directing and overseeing the employees' work, and the employees were subject to Mediclean's work rules and policies. Mediclean executives met and bargained over the terms and conditions of the production employees' employment over a period of roughly eight months, without the involvement of staffing agencies.

Moreover, the employees did not perform work at any staffing agency such as screening applicants, matching and dispatching workers to various businesses, or performing other tasks typically associated with a staffing service. In essence, they are the staffing agencies' product, the asset from which they make their money. Both before and after Mediclean was sold to Emerald, the workers sorted, washed, dried, folded, and ironed medical laundry in furtherance of Mediclean and Emerald's business. Whether the staffing agencies were also employers does not affect my finding that the entities where the employees actually worked were employers.

Based on the foregoing, I find that Mediclean and Emerald were employers.

2. Substantial continuity of operations

The next question is whether there was substantial continuity between Mediclean and Emerald's operations. This inquiry is "factual in nature and is based upon the totality of the circumstances of a given situation" and "requires that the Board focus on whether the new company has 'acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'" *Fall River Dyeing* at 43, quoting *Golden State Bottling Co.* at 184. The Board considers a number of factors, including (1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products, and basically has the same body of customers. See *Burns*, 406 U.S., at 280, n. 4,; *Aircraft Magnesium*, 265 NLRB 1344, 1345 (1982), enfd. 730 F.2d 767 (9th Cir. 1984); *Premium Foods, Inc*., 260 NLRB 708, 714 (1982), enfd. 709 F.2d 623 (9th Cir. 1983).

No single factor has controlling weight. *Pennsylvania Transformer Technology, Inc. v. NLRB*, 254 F.3d 217, 223 (D.C. Cir. 2001), enfg. 331 NLRB 1147 (2000). In conducting the analysis, the Board keeps in mind the question of whether "those employees who have been retained will understandably view their job situations as essentially unaltered." *Golden State Bottling Co*. at 184; See also *Fall River* at 43 ("This emphasis on the employees' perspective furthers the Act's policy of industrial peace."); *Allways East Transportation, Inc*., 365 NLRB

No. 71, slip op. at 3 (2017) ("Most importantly, these factors are to be analyzed from the perspective of the employees.")

Here, the business of the employers is essentially the same, i.e. servicing laundry needs of hospitals. The workers at Mediclean and Emerald performed the same basic tasks: sorting, washing, drying, ironing, and folding laundry. See *Montauk Bus Co*., 324 NLRB 1128, 1134–1135 (1997)("While there are some differences in the way [the successor] operates . . . it is self evident that both are involved in the same employing industry and that the employees essentially do the same work. They drive school buses.").

Though the Respondent changed models from a COG to a rental model, the employees uniformly testified that their basic work did not change.[27] The same holds true for the change from using a temporary staffing agency to a direct hire model to staff the facility—this did not impact the employees' duties. While the equipment was upgraded, there is no evidence to show this fundamentally changed the nature of the work the employees performed. See *Hospital San Francisco*, 293 NRLB 171 (1989), enfd. 905 F.2d 906 (1st Cir. 1991) (facility improvements and new equipment did not change fundamental nature of the employer—a general health care facility—and did not substantially change unit employees' duties or working conditions); *Van Lear Equipment, Inc*., 336 NLRB 1059, 1063–1064 (2001) (finding substantial continuity where employees continued to perform essentially the same work even though successor provided different supervision, different pay rates and benefits, and newer equipment); *Foodway of El Paso*, 201 NLRB 933, 936–937 (1973)(successorship found where the new company instituted a new system for loading and unloading merchandise, remodeled store, and changed shelving arrangements and merchandise placement.) The essential nature of the work and the skills required to perform it remained the same before and after the change of ownership. *Capitol Steel & Iron Co*., 299 NLRB 484 (1990).

The employees also testified that they took their direction from the same supervisors both before and after Emerald assumed operation of the Commerce facility. While Emerald brought in new managers and upper level leadership, this was not a substantial change for the employees. See *M.S. Management Associates, Inc*., 325 NLRB 1154, 1155 (1998), enfd., 241 F.3d 207 (2d Cir. 2001); *Van Lear Equipment*, above; *Everport Terminal Services, Inc.*, 370 NLRB No. 28 (2020); *Allways East Transportation*, supra, (continuity found even though successor school bus transportation provider had different supervisors, a new facility, wages, fueling procedures, and employee handbook policies).

Finally, when it assumed Mediclean's operations, Emerald continued servicing Mediclean's customers. Although the specific customers Emerald contracted with evolved over time, it still serviced the same body of customers, i.e. hospitals seeking medical laundry services. *Deaconess Medical Center*, 314 NLRB 677 (1994)("body of customers" in health care industry signifies patients or those comparably in need of medical attention); *Good N' Fresh Foods*, 287 NLRB 1231 (1988)(question is whether they "basically [have] the same body of customers," i.e., whether they do business in the same market.). Even under a narrower interpretation of "body of customers" to mean specific clients, *Fall River* mandates evaluation from the employees'

[27] As counsel for the Acting General Counsel points out, Mediclean operated under both models. (R. Exh. 7; GC Br 60.) Sznewajs stated that the actual work is identical under both models. (Tr. 385.)

viewpoint. Emerald's decision to service different hospitals than Mediclean over time did not fundamentally change the nature of the work the employees performed or their working conditions.

The Respondent claims that the scale of operations changed. As the Board has held, however, "a change in scale of operation must be extreme before it will alter a finding of successorship." *Mondovi Foods Corp.*, 235 NLRB 1080 (1978); *Contract Carrier*, 258 NLRB 353 fn. 2 (1981) (change in the scale of operations not sufficiently extreme, especially when considered in light of the other relevant factors). Like other factors, it is measured from the perspective of the Respondent's employees. *Bronx Health Plan*, 326 NLRB 810 (1998), enfd. 203 F.3d 51 (D.C. Cir. 1999) ("[F]rom the perspective of the Respondent's employees, there was no change in the scale of the operation."). In the instant case, particularly considering the impact on the employees, I find any change to the scale of operations does not warrant a finding that Emerald is not a successor to Mediclean.[28]

The Respondent relies on *CitiSteel USA, Inc. v. NLRB*, 53 F.3d 350, 354–55 (D.C. Cir. 1995), to assert that Emerald is not a successor. In that case, however, there was a hiatus of 2 years when the mill was closed, the facility was transformed with a $25 million capital infusion from a specialty steel mill to a "minimill" producing a narrow range of steel products, and the successor jobs were more complex and required the employees to take on more responsibilities, including some previously supervisory functions. It is clearly distinguishable from the instant set of facts.

The Respondent also points to *Radiant Fashions, Inc*., 202 NLRB 938 (1973), a case decided before the Supreme Court issued *Fall River*, and upon which its dissent relied. 483 U.S. at 59 (Justices Powell, Rehnquist, and O'Connor dissenting).[29] The *Radiant Fashions* Board reversed the administrative law judge's finding of successorship based primarily on a 2 ½–3 month hiatus characterized by continuing efforts to sell the plant and the fact that the purchaser began operations as a sewing contractor rather than a manufacture. In *Fall River*, the Court deemed irrelevant a switch from converting dyeing to commission dyeing, a change in the

[28] The Respondent takes issue with the employees' testimony, asserting that the employees who worked at both Mediclean and Emerald did not work a sufficient duration for Emerald. The Respondent, however, failed to call any employee witnesses to refute the consistent testimony that the employees' jobs remained substantially similar both before and after Emerald's acquisition. I therefore find this attempt at undermining the employee witness' testimony unconvincing. This is particularly true considering Munoz was rehired in 2020 and testified the work she performed was substantially the same.

[29] The dissent essentially argued that if *Radiant* Fashions had been followed, *Fall River* would have had a different result, stating:

> The case before us bears a substantial resemblance to *Radiant Fashions, Inc*., supra. In that case, the alleged successor was engaged in a business similar to that of its predecessor, at the same location, with the same equipment, the same supervisory personnel, and a reduced but similar work force. The Board nevertheless ruled that the company was not a successor. It based its conclusion on four factors: (i) there was a "lengthy" hiatus of 2½ to 3 months between the time the first company shut down and the second company began production; (ii) the second company bought only the assets of the first business, rather than an ongoing enterprise; (iii) the second company served a different market; and (iv) there was no transfer of customers as a result of the sale. 202 N.L.R.B., at 940–941.

Fall River, supra. at 58, fn.6.

business akin to what occurred in *Radiant Fashions*. In addition, in *Radiant Fashions*, a completely new product line was introduced, the successor retrained its employees in new skills, and continued in competition with the predecessor corporation. Finally, *Fall River* placed the emphasis on whether the employees view their job duties as essentially unchanged, a factor not considered in *Radiant Fashions*. To the extent *Radiant Fashions* survives *Fall River*, it is meaningfully distinguishable.[30]

The Respondent relies on *Galis Equipment Co.,* 194 NLRB 799 (1972), another pre-*Fall River* case. In *Galis*, the successor temporarily operated the business with the predecessor's employees in order to finish certain work already in progress. When that work was completed, the successor changed the essential nature of the work to be performed, necessitating the replacement of the predecessor's employees with those possessing different skills needed to perform the functions of the new operation. Here, the employees Emerald hired did not possess different skills, and in fact Emerald management stated a preference to hire the former Mediclean employees because of their qualifications and to mitigate against high turnover. Finally, *Galis* is difficult to reconcile with *Fall River's* admonition that a bargaining obligation attaches when "the employer *intends* to take advantage of the trained work force of its predecessor." *Fall River*, 482 U.S. at 41 (Emphasis in original, footnote omitted).

I also note the Respondent's reliance on *Lincoln Private Police, Inc*., 189 NLRB 717 (1971), a pre-*Burns* and pre-*Fall River* case that was cited by the dissent in both *Burns* and *Fall River* and has not been relied upon to find a lack of successorship since *Fall River* was decided. See *A.J. Myers & Sons, Inc*., 362 NLRB 365 (2015). *Gladding Corp.,* 192 NLRB 200 (1971), another case cited by the dissent in *Fall River*, likewise has not been relied upon to find a lack of successorship since *Fall River*.[31] They are also factually distinguishable from the instant case.

The evidence establishes that the Respondent continued Mediclean's operations with no hiatus, using the same facility, the same workforce performing the same work and providing the same services to the same base of customers. I find, therefore, the Acting General Counsel has proved continuity of operations.

3. Substantial and representative complement of employees

A *Burn*s successor's duty to bargain with a union representing the predecessor's employees only attaches if the successor hires a "substantial and representative complement" of employees, the majority of whom were previously employed by the predecessor. *Fall River*, 482 U.S. at 42–43, 47. "In general, if a new employer continues operations uninterrupted, the proper substantial and representative complement determination should take place at the time of transfer

[30] I note that the Board has not relied upon *Radiant Fashions* to find a lack of successorship since the passage of *Fall River.*

[31] Citing to *Gladding*, the Respondent asserts that "enterprise continuity does not exist where the predecessor operated a single facility, as compared to a new employer's multi-plant, integrated enterprise." (R Br. 51.) Post *Fall River*, in considering substantial continuity, "[t]he employing enterprises are not the overall companies involved, but the . . . facilities whose employees were taken over by Respondent." *Southern Power Co*., 353 NLRB 1085, 1090 (2009), adopted, 356 NLRB 201 (2010), enfd. 664 F.3d 946 (D.C. Cir. 2012).

of control." *Shares, Inc. v. NLRB*, 433 F.3d 939 (7th Cir. 2006). See also *Fall River* at 47; *3750 Orange Place Ltd. Partnership v. NLRB*, 333 F.3d 646, 663 (6th Cir.2003); *Prime Services, Inc. v. NLRB*, 266 F.3d 1233, 1239–1240 (D.C.Cir.2001).

In the instant case, the Commerce facility did not cease operations, and continued to run at the time of transfer. Employees were staffed "in a complete range of jobs" to enable production to continue without any hiatus. *Fall River* at 33. On December 11, 2018, Emerald began its operations with a workforce comprised predominantly of the former Mediclean employees. I find, therefore, that the Respondent had a substantial and representative complement of employees when it took ownership of Emerald and commenced business.

The Respondent offers several arguments as to why it did not employ a substantial and representative complement of employees until months after it took over Mediclean's operations. I find them unavailing and address each one below.

The Respondent points to *Fall River*, 482 U.S. at 47, to assert that the appropriate time to measure majority status is not the first date the new employer begins operations, but instead following a "start-up period by the new employer while it gradually builds its operations and hires employees." This language from *Fall River*, however, explains the distinction between successor employers that immediately begin operations and successor employers that begin operations following a hiatus. The Court emphasized that *Burns* "did not have to consider the question *when* the successor's obligation to bargain arose" because "Wackenhut's contract expired on June 30 and Burns began its services with a majority of former Wackenhut guards on July 1." Id. (Emphasis in original). The same holds true here.[32]

The Respondent cites to *Myers Custom Prod*., 278 NLRB 636, 637 (1986), where the Board held that when a "new employer expects, with reasonable certainty, to increase its employee complement substantially within a relatively short time, it is appropriate to delay determining the bargaining obligation for that short period." In that case, the successor commenced operations on September 17, 1984, with 13 unit employees. The parties stipulated that the successor had planned, before commencing operations, to take 2 to 3 months to select and train a full employee complement. Within 60 days, the successor had doubled the workforce. The Board found it was "appropriate to maximize the number of employees selecting a bargaining representative by delaying determination of the bargaining obligation for the short duration of the planned work force expansion."

In the instant case, the Respondent did not expand the workforce. Indeed, the number of employees in bargaining unit positions at the Commerce facility was not significantly different from the date it began operations in December 2018 until after the end of May 2019 when the work that had been temporarily performed in San Diego returned. See *Ford Co*., 367 NLRB No, 8 (2018), slip op. at 12–14. (Employees' representational rights do not get put on hold while the successor spends months implementing its transitional changes); *Hospital San Francisco*, supra

[32] The *Burns* Court noted that "[i]t would be a wholly different case if the Board had determined that because Burns' operational structure and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one." 406 U.S. at 279. As explained above in the section on continuity of operations, I find that the changes were not significant enough to disrupt the unit.

(Where new employer was unsuccessful in its desire to hire a significant number of additional registered nurses, the Board found no basis for concluding that the employer's expansion plans were "reasonably certain" to be accomplished within a "relatively short time."). Moreover, the Respondent's initial mass discharge followed by the rolling discharges of former Mediclean employees without explanation while simultaneously hiring outside employees, does not align with this stated goal of greatly expanding the workforce. Regardless, as any stated plans to increase the workforce had not materialized in a "relatively short time," I find the Respondent's arguments related to a planned expansion unpersuasive.

Citing to *Stadium Hotel Partners, Inc*., 314 NLRB 982, 986–987 (1994), the Respondent contends that the Board has declined to find a substantial and representative complement of employees where the new employer only engaged the predecessor's employees on a temporary basis. In *Stadium*, the predecessor employees were discharged before the successor bought the hotel. The successor closed down the hotel. Before the hotel was fully reopened, some of the predecessor's former employees worked 13–16 hours, and the union did not refute the successor's assertions that it did not pay these employees for this time. Once the hotel was up and running, a majority of the hired workforce were not members of the predecessor bargaining unit. This is clearly different from the case here, where the entire Mediclean workforce remained employed at the time of the sale and there was no cessation of operations. While it is true that Emerald did not intend to continue to staff its workforce using Premier, it is equally true Emerald expressed to the employees that it wanted to retain them.[33]

The Respondent contends that Emerald's operation was not in normal or substantially normal production. *Fall River*, 482 U.S. at 49. Specifically, the Respondent contends that the Commerce facility's capacity was immediately and materially to be reduced to accommodate a capital improvement project. Essentially, the Respondent argues that the Union needed to wait out the roughly six months from December 2018 to May or June 2019, when the work that had been temporarily relocated to San Diego had returned and the renovation was completed. In this connection, the Board has noted that employees should not have to wait "months or years until the very last employee is on board." *Clement-Blythe Cos*., 182 NLRB 502 (1970), cited in *Fall River*, 482 U.S. at 49 fn. 15; *Ford Co*., supra. In *Sullivan Industries v. NLRB*, 957 F.2d 890, 897, (D.C. Cir. 1992), the court held that 79 employees constituted a substantial and representative complement for measuring majority status, despite the employer's projection that 180 employees would be hired. In any event, the former Mediclean bargaining unit workforce employed before the renovation and during any displacement of work was larger than the Emerald direct-hire workforce after it, and the work both groups of employees performed was

[33] Employees specifically recalled being told at the December 10, 2018 meeting that nobody would be fired. The Respondent notes that the extent to which the former Mediclean employees would choose to apply and be able to pass E-verify was unknown. It would therefore be speculation to assume that the former Mediclean workers were not a substantial and representative complement of employees based on the possibility that they couldn't pass E-verify. Notably, to continue operating without a hiatus using Mediclean's established workers, the Respondent was willing to overlook the E-verify requirement, at least temporarily.

essentially the same. Even during "normal" operations, the workforce did not expand in a manner that would significantly dilute the unit.[34]

Based on the foregoing, I find the Respondent had a substantial and representative complement of employees when bargaining was requested and when Emerald took over operations from Mediclean, and it was a successor under *Burns* and *Fall River*.

B. The Discrimination Allegations

Complaint paragraph 18 alleges that the Respondent, through discharges and new external hires set forth in paragraphs 10–12, enacted a plan that discriminated against employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

When a new employer would have hired a majority of its unit employees from the predecessor's unionized work force but for the new employer's discrimination based on antiunion animus, the Board will deem the new employer a successor with an obligation to recognize and bargain with the union that represented the predecessor's unit employees. *Downtown Hartford YMCA*, 349 NLRB 960, 984 (2007), citing *Waterbury Hotel Management., LLC v. NLRB*, 314 F.3d 645, 655 (D.C. Cir. 2003); accord *NLRB v. CNN America, Inc*., 865 F.3d 740, 752 (D.C. Cir. 2017). The Board applies *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), in such cases to determine whether an employer's failure to hire employees of its predecessor was motivated by antiunion animus. *Planned Building Services*, 347 NLRB 670, 673 (2006).[35] In applying this standard, the Board considers such factors as:

> [S]ubstantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

Id., quoting *U.S. Marine Corp*., 293 NLRB 669, 670 (1989), enfd. en banc 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992)). "Once the General Counsel has shown that the employer failed to hire the employees of its predecessor and was motivated by antiunion animus, the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive." *Id*. at 674.

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[34] The Respondent cites to *Elmhurst Care Center*, 345 NLRB 1176, 1177 (2005) and a line of cases regarding when premature voluntary recognition of a union may violate the Act under Sections 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2). These cases are inapposite here.

[35] *Planned Building Services*, was overruled on other grounds by *Pressroom Cleaners*, 361 NLRB 1166 (2014), and is still regularly cited and relied upon by the Board in cases alleging failure to hire to avoid successorship. See, e.g., *Ridgewood Health Care Center, Inc*., 367 NLRB No. 110 (2019).

1. The terminations and hiring practices

Here, there is ample evidence that the Respondent wanted to divest itself of the Union. To start, the Respondent specifically excluded the voluntary recognition agreement from the asset purchase agreement. The Respondent, relying on Sznewajs' testimony, argues that the voluntary recognition agreement confused Emerald, given that Mediclean represented it only had one employee. (R Br. 15.) Sznewajs and Smith clearly understood, however, that Emerald was purchasing a facility with a union, and this information was shared with Luckenbach, Anderson, and others. (R Exh. 9.) There was no genuine confusion.

The Acting General Counsel argues that exclusion of the staffing agreement with Premier is also evidence of union animus. Had the Respondent facilitated the Mediclean employees' applications through Link or Kamran as they did for the employees brought in through these agencies on December 9, 2018, or hired them directly like the direct hires done in December 2018, the exclusion of the asset purchase agreement would not matter. It appears, however, that its exclusion was part of the broader plan to have a nonunion workforce. The Respondent tends to put much weight on the fact that Mediclean did not ask Premier to E-verify the workers. The fact that Premier was willing to E-verify employees and/or enter into a new contract with Emerald, however, negates this concern.[36] In any event, Emerald was certainly willing to continue to utilize the former Mediclean employees, despite any doubts about them passing E-verify, to permit them to continue operations seamlessly.

The termination of 18 Mediclean employees on December 11, 2018, the day after closing, coupled with the hiring of 29 employees from two different staffing agencies as of December 9, the day prior to closing, is certainly evidence of "inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive" and "evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine" in a variety of ways. The Respondent, claiming to want to keep Mediclean's trained workforce and claiming to operate on a direct-hire model, hired more workers through staffing agencies as of December 9, 2018, than the Mediclean employees it summarily discharged on December 11. In addition, Emerald hired six employees directly, in December 2018, all of whom were hired for the morning shift that the vast majority of the terminated former Mediclean employees had worked. This chain of events completely eviscerates the Respondent's argument that these employees were let go because their work was transferred to San Diego.[37]

The Respondent contends that the temporary employees were hired over concerns about a "mass exodus" once the Mediclean workers learned that Emerald was going to E-verify them.

[36] The Respondent's concern that Premier could not E-verify the existing workforce because it is not permissible with E-verify is likewise not convincing. Emerald, as a new employer of these employees, could have hired and E-verified them in the same manner they did for the direct hires—and in the manner it E-verified the former Mediclean employees it ultimately directly hired.

[37] The evidence also shows that the work was not sent to San Diego until January 2019. (R Exh. 22; Tr. 594).

The evidence shows, however, that Emerald management did not know whether or not the Mediclean employees would pass E-verify, and Luckenbach said he became concerned after speaking with Ballesteros, which occurred after the Link and Kamran employees had been hired. And though 12 soil sort employees quit shortly after Emerald took over operations, there is no evidence that these employees left because they perceived some immediate threat of being E-verified. There is no evidence the employees even knew about the Respondent's plan to eventually E-verify them. Lomeli, who worked in the soil sort department was unaware of such a plan.[38] Likewise, Nolasco, who worked until January 9, 2019, did not recall hearing that Emerald planned to E-verify its employees.[39] Mageean did not recall any concerns about the former Mediclean employees and the E-verify process. Finally, as Recinos testified, following the mass discharges and hiring of new workers, the employees saw the writing on the wall and started to resign.

The evidence regarding the use of staffing agencies is highly inconsistent. Luckenbach testified that it concerned him that Mediclean was relying so heavily on a staffing agency for its workers because in his 40-years' experience in the industry, temporary staffing agencies do not usually E-Verify. He explained that one of the commercial laundering facilities he operated for another employer experienced an ICE raid that "wiped out the whole plant" leaving the company "in dire straits." Yet even before it began operations, Emerald engaged two staffing agencies, Link and Kamran, for the stated purpose of obtaining E-verified workers.

No reason was given at all for why any of the specific employees discharges on December 11 were chosen. The Acting General Counsel asserts that the Respondent's failure to call anyone with knowledge of how the employees were chosen is suspicious and weakens the Respondent's assertion that the terminations relate to the work that temporarily ceased at the Commerce facility and was picked up in San Diego. The Acting General Counsel, citing to *Martinson Electric Co*., 319 NLRB 1226, 1227 (1995), requests an adverse inference because the Respondent had this relevant evidence within its control but failed to produce it. *International Automated Machines*, 285 NLRB 1122, 1123 (1987). Specifically, neither Esquen nor Silva, the two Emerald supervisors in charge of deciding which employees to terminate, were called to testify. Because the Respondent offered no explanation as to why these employees were chosen for termination, I infer that the reasons, if offered, would not have supported the Respondent's asserted legitimate nondiscriminatory reasons for the December 11, 2018, discharges.[40]

Though the mass termination and hiring was most dramatic right before and after the sale, the Respondent continued to let go of former Mediclean employees without the decision-

[38] I give no weight to Luckenbach's testimony that Ramirez told him that some unidentified person told Ramirez that Ballesteros had told employees that Respondent planned to E-verify them. (Tr. 460–462) It is beyond double hearsay. See *Auto Workers Local 651 (General Motors)*, 331 NLRB 479, 481 (2000); *T.L.C. St. Petersburg*, 307 NLRB 605 (1992), affd. mem. 985 F.2d 579 (11th Cir. 1993). The E-verify posters had not yet been hung at the facility.

[39] Nolasco was re-hired in 2020. As a current employee testifying against her own pecuniary interests, I find her testimony particularly reliable. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co., Inc*., 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division of Unarco Industries*, 197 NLRB 489, 491 (1972).

[40] I would come to the same conclusion without an adverse inference. There was likewise no evidence regarding the justifications for terminating the other former Mediclean employees in 2019.

makers providing any rationale, and hire outside employees, as detailed in the statement of facts.[41] Ads to hire more than 10 production workers at a time were placed on Indeed.com starting on December 16 and were re-posted multiple times, and there was another mass termination in March 2019. No convincing explanation was given for the juxtaposition of these seemingly contradictory actions

The Respondent also gave inconsistent explanations as to the delay in the hiring process for the former Mediclean employees. According to Luckenbach, the Respondent delayed accepting applications from the former Mediclean employees to avoid a mass exodus of employees who were afraid of being E-Verified, because the holiday season was coming, and because the Respondent wanted to wait until the human resources manager was hired. Mageean said the delay in accepting applications was because Respondent did not have the time and did not want to steal Premier's workforce. All of these explanations are belied by the evidence.

First, as explained above, there is no evidence the employees knew the Respondent had plans to E-verify them once they permitted them to apply until Zamora put the E-verify posters up at the facility on some date after January 6, 2019. Any concerns about a mass exodus also ring false juxtaposed with the mass termination on December 11, 2018 – which both doesn't square with such a concern, and indeed created the very problem Emerald was ostensibly trying to guard against by instilling fear among employees and causing resignations. As for the impending holiday season, the lack of time, and the need to wait for Zamora to be hired, these concerns did not deter the Respondent from posting ads and hiring external workers, both directly and through staffing firms.

Even once Zamora was hired on January 6, 2019, he was told initially to focus on hiring external employees. This is at odds with the Respondent's stated desire to keep the Mediclean workforce. Zamora even held a job fair at a local hotel and a recruitment fair through the California Employment Development Department.[42] The continuing focus on prioritizing external applicants over former Mediclean employees is strong evidence that the Respondent wanted to dilute the unionized workforce.

Finally, the evidence, detailed in the statement of facts, shows that Emerald facilitated the hiring of the nonunion drivers before the production workers. In this regard, I credit Mageean's testimony that the drivers were very vocal to him about being converted, so he instructed Zamora to expedite them. Zamora did not really contradict this, testifying only that in his recollection the drivers applied "around the same time" as the bargaining unit employees.

In short, Emerald had engaged two staffing agencies and hired employees through them, conducted a mass discharge and multiple other discharges of trained former Mediclean

[41] Tellingly, when employees were terminated for a reason, that reason was conveyed in the emails Recinos received from Emerald.

[42] In its closing brief, The Respondent contends that Zamora spent his first week recruiting external applicants at an off-site hotel because the capital project construction did not allow for on-site interviews. (R Br. 29). This misrepresents Zamora's testimony—He specifically testified he did not know why the initial focus was on external employees. He did say there was a lot of construction, but this does not explain why he was told to focus on external applicants.

employees without providing reasons as to why these employees were chosen for discharge, conducted direct hires, repeatedly posted on Indeed.com for multiple hires, and held job fairs for external applicants, before allowing the former Mediclean bargaining unit employees to apply. It is hard to conceive of a better way to encourage attrition.

I find the Acting General Counsel has met the initial burden under *Wright Line*. See *Shortway Suburban Lines*, 286 NLRB 323, 326 (1987), enfd.862 F.2d 309 (3d Cir. 1988)(Successor's decision not to hire the predecessor's employees even though it knew they were experienced, had no reservations about their competency, and had a past practice of preferring experienced employees, supports claim of discrimination).

The Respondent contends that after closing on December 11, 2018, Emerald did not immediately hire its workforce, because it needed to evaluate its hiring needs in light of its capital improvement project and customer demand. (R Br. 43.) Given the external hires that took place, this is not a believable explanation.

Curiously, the Respondent contends that the Acting General Counsel's prima facie case fails because the alleged discriminatees did not engage in any protected concerted activity. This misstates the paradigm applicable in the current context, i.e., where the employees at issue are all union members and the allegation is the successor wants to avoid recognizing the Union. The same holds true for the Respondent's assertion that Emerald had no knowledge of any protected activity, that the employees selected for termination did not engage in protected activity distinct from those who were not terminated, and that Mediclean's managers and supervisors were treated less favorably than the bargaining unit.

Turning to the Respondent's asserted legitimate reasons for its course of conduct, the Respondent contends that it released the employees because of the reduced capacity during the renovations. For the reasons set forth in detail above, I find this to be pretext.

The Respondent claims it has a legitimate practice of hiring an E-verified workforce. This begs the question as to why the Respondent did not just seek to E-verify the former Mediclean workers. When asked about this, Luckenbach admitted they could have E-verified the former Mediclean employees but chose not to do so because Emerald wasn't ready yet:

> Q For E-Verified employees, did you ask him, Mr. Ramirez, to E-Verify the existing employees?
> A Did I ask him if he - did they - existing?
> Q Yeah. That - that - did he consider E-Verifying the employees?
> A No, we had not - we had not started E-Verifying yet.
> Q Why not?
> A We weren't ready yet.
> Q So let me try to understand this. You had employees from Premier that you were using to operate the plant, correct?
> A Correct.
> . . .

> Q So the reason for not E-Verifying the Premier employees who were already working was because you were afraid they would leave and it would affect your operations; is that correct?
> A Right.

(Tr. 481–482.) The fact of the matter is, if E-verification was the Respondent's overarching concern, nothing was stopping Emerald from immediately E-verifying the former Mediclean employees.[43] And, more fundamentally, there is no evidence regarding which of the initial 83 employees would have passed E-verification. The Respondent's gamesmanship around what could have been a straightforward process is evidence of pretext.

Finally the Respondent asserts that Emerald tried to give the Mediclean workers a genuine opportunity to apply, but there was a lack of qualified applicants.[44] Though the Respondent did eventually permit the former Mediclean employees to apply starting in mid-January 2019, by that time at least 37 former Mediclean employees had been terminated with no notice. Given the wage rates and skill levels of the jobs at issue, it would defy common sense for these employees to wait to reapply to the job from which they were summarily terminated rather than seek a new job. The remaining employees saw the old Mediclean workers being terminated and replaced by a greater number of new employees hired before they were permitted to even seek direct employment. By the time the Respondent permitted the former Mediclean employees to apply, the process was tainted.[45] Moreover, as the Respondent was permitting employees to apply, it continued its course of summarily firing them without explanation and bringing in external employees. Finally, it is clear the Respondent initially retained the former Mediclean employees with no application process and admitted they were qualified, indeed preferable, to new untrained employees. If all that was missing was the E-verification piece, the Respondent was perfectly capable of E-verifying the current workforce.[46]

Based on the foregoing, I find the Acting General Counsel has met the burden to prove the Respondent engaged in a process of terminations and hiring designed to avoid the Union.

2. Alleged refusal to consider for rehire and to rehire employees

Paragraph 12 of the complaint alleges that the Respondent violated the Act by refusing to consider for hire and refusing to hire Ada Soto and other employees.

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[43] As discussed below, the Respondent did have an obligation to bargain, but clearly the Respondent was not operating under such a belief.

[44] The Respondent contends that Emerald completed its hiring process and considered the Commerce facility fully staffed in or around December 2019, and at the end of the recruiting and hiring process, only a small percentage of the workforce was composed of former Premier HR workers. (R Br. 33.) I am not evaluating the percentage of former Mediclean employees worked for Emerald when it was finally fully staffed, but instead at the time it took over operations and continued operations with a "substantial and representative complement of employees."

[45] As Alejandrina Rojas testified, she informed Motta and Lagos since so many people were being fired, she was afraid she would be fired, so she found a new job.

[46] As detailed above, the explanations for the explanations for the delay and for the stated need to terminate employees do not withstand scrutiny.

a. Ada Soto

There is no dispute Ada Soto was terminated on January 8, 2019, and applied for employment with Emerald directly on April 9, 2019.

The Respondent contends that Zamora was not aware of Soto's previous employment with Mediclean, as it was not listed on her application. I find that the Respondent was on notice that Soto worked at Mediclean, and was thus a bargaining-unit member, by virtue of the facts that: (1) Soto was and remained employed when Emerald took over operations from Mediclean; (2) in a January 8, 2019 email, Esquen told Recinos that Rodriguez had instructed him not to pay Soto holiday pay because she did not work on January 1; and (3) the Respondent, through Esquen, instructed Recinos to tell Soto she was fired as of January 8. In light of these personnel actions, the Respondent cannot disavow knowledge that Soto had been a Mediclean employee, and as such was part of the bargaining unit.[47] See *Dobbs International Services*, 335 NLRB 972, 973 (2001); *State Plaza Hotel*, 347 NLRB 755, 755–756 (2006). For the reasons detailed above, I find the Acting General Counsel has established a prima facie case that its termination and hiring practices were designed to avoid the Union.

The Respondent did not present a legitimate nondiscriminatory reason for refusing to consider for rehire or refusing to rehire Soto. The spreadsheet Zamora created regarding the fate of the former Mediclean employees who applied directly lists the reason Soto was not hired as "decided not to interview." Zamora admitted that he made this reason up because he could not remember why Soto wasn't hired:

> I couldn't remember what had happened with Ada. I did not remember her. I could not recall. In speaking with Nate, he didn't either. We asked managers and no one could remember exactly what happened. And since there were no specific notes on this individual, the only conclusion that we - that we came up with is that she decided not to interview.[48]

Because the Respondent has not come forward with a legitimate nondiscriminatory reason for failing to consider Soto for rehire or failing to rehire her, I find the Acting General Counsel has met the burden to prove this allegation.

b. Other employees

The Acting General Counsel also contends that the other non-rehired employees referenced in Zamora's spreadsheet were also subjected to discrimination. To account for the former Mediclean employees who were not converted to Emerald employees, the Respondent presented a spreadsheet summarizing Zamora's notes from the hiring process. (R Exh. 28.) Specifically, the Acting General Counsel asserts that an adverse inference should be drawn regarding the explanations for not hiring the bargaining unit members who were not rehired, as depicted on the first page of the summary.

[47] I note that many other employees were rehired despite failing to mention their work at Mediclean on their applications. (Jt. Exhs. 4, 5.)

[48] Tr. 656.

The spreadsheet is riddled with significant problems. First, as described above in footnote 24, it relies upon incorrect information from other exhibits as to when the employees terminated in March last worked. And, as set forth directly above, it contains an inaccurate and concocted reason for why Soto was not rehired.

I further discount the spreadsheet because Zamora shredded the notes from which he derived the information he included in it, even though he made the spreadsheet in connection with the instant complaint.[49] The Acting General Counsel specifically asked what Zamora relied upon to make the spreadsheet, and Zamora said he had relied upon his since-shredded notes. Under Fed. R. Evid. 1006, summaries are admissible if the underlying documents would be admissible and have been made available to opposing counsel for examination, and a proper foundation for the summary is established. Here, the underlying documents cannot be made available to opposing counsel, and there is no other evidence establishing the reasons for failing to rehire the employees. Because of this, reliance on the spreadsheet runs afoul of Fed. R. Evid. 1006, and I therefore do not give it evidentiary weight. As no other explanation was provided, under the same rationale with regard to Soto above, I find the Acting General Counsel has established discriminatory failure to re-hire the bargaining unit employees who applied but were not re-hired.[50]

C. Refusal to Bargain Allegations

Paragraphs 15–17 of the complaint allege that since about December 10, 2018, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit. In paragraphs 16 and 17, the complaint alleges the Respondent was specifically required to bargain over the terminations and failures to hire.

Section 8(a)(5) of the Act provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." There is no dispute that the Union requested bargaining on December 10, 2018. And, as detailed above, I have found the Respondent is a *Burns* successor.

[49] Tr. 652, 657–658.

[50] Well-established Board law provides that when the General Counsel has proven unlawful conduct against a defined and easily identifiable class of employees—here, bargaining-unit members who applied for work with Emerald but were not rehired—the Board, with court approval, has found it appropriate to extend remedial relief to all members of that class, including individuals not named in the complaint. See *Iron Workers Local 433 (Reynolds Electrical*), 298 NLRB 35, 36 (1990); *Grand Rapids Press*, 325 NLRB 915 (1998), enfd. mem. 208 F.3d 214 (6th Cir. 2000)(applying this standard in 8(a)(3) context and leaving identification of specific discriminates to the compliance stage).

Although I have determined the bargaining unit is "an appropriate unit" at least one supervisor and one driver, who are not bargaining unit members, are listed on R Exh. 28. The Acting General Counsel will need to identify the specific bargaining unit employees affected during the compliance stage of proceedings to remedy both the 8(a)(3) violations as well as the 8(a)(5) violations. In this regard, I note that inclusion of employees who did not pass E-verify will be a matter for compliance, depending on the outcome of bargaining over the manner of checking work authorization, as discussed below.

1. Timing of request for bargaining

The Respondent contends that the Union demanded bargaining prematurely. First, the Respondent contends that the demand to bargain was made before closing on December 10, 2018, because closing was at 11:59 p.m. and the demand was made earlier in the day. Mahoney sent the December 10 request to bargain after Emerald executives had conducted a meeting with employees announcing Emerald was the new owner. The dates he suggested bargaining were December 18, 19, 20, and 21, which was after Emerald assumed operations. In addition, Luckenbach testified that Emerald was already operating the Commerce facility by the time of the December 10 morning employee meeting.

In any event, in *Aircraft Magnesium*, 265 NLRB 1344, enfd. 730 F.2d 767 (9th Cir. 1984), the Board emphasized that "a request for bargaining is continuous and need not be repeated." Once a demand has been made, a bargaining obligation will be established if, at any time thereafter, the employees of a predecessor constitute a majority of a representative complement of the new employer's workforce. In other words, a premature demand constitutes a continuing demand which triggers a bargaining obligation when an employer opens for business. *Fremont Ford*, 289 NLRB 1290, 1295 (1988).[51]

Citing to *Cascade General*, 303 NLRB 656, 657 (1991), a case involving an alleged violation of Section 8(a)(2), the Respondent asserts that it was not obligated to bargain following the Union's demand because an employer risks violating the Act by recognizing the union if it has plans to expand its operations and greatly increase its workforce.[52] This case, and other cases involving an employer's voluntary recognition of a union in the context of a rivalry dispute are inapposite. Accordingly, I find the Union's demand to bargain was timely.

2. Appropriateness of bargaining unit

The Respondent contends that the Acting General Counsel's case fails because the Union demanded that Emerald recognize it as collective-bargaining representative of an improper and illegal bargaining unit consisting of "all full-time and regular part time employees employed by the Employer at its facility in Commerce, CA." Mahoney, however, provided unrefuted testimony that over the course of bargaining, the parties agreed to exclude drivers, maintenance workers, managers, and supervisors from the bargaining unit, thereby perfecting it.[53] The Board places a heavy evidentiary burden on a party attempting to show that historical units are no

[51] In *Fall Rive*r, the Supreme Court approved of the Board's "continuing demand" rule.

[52] Even assuming *Cascade* was applicable here, the new employer extended recognition to a workforce with 16 employees on the payroll, when it had purchased assets that would require hiring 600-800 additional employees. As detailed above, no such expansion is present in the instant case.

[53] In *Specialty Hospital of Washington–Hadley, LLC*, 357 NLRB 814, 815 (2011), the Board held, "For purposes of successorship, we perceive no persuasive reason why it should matter whether it is the employer or, as here, the union that alters (or perfects) the unit by eliminating classifications from the unit." It further stated that "it makes no difference whether the successor acquired only a part of the unit or the union disclaimed interest in a part of the unit . . . Put another way, a diminution of unit scope or unit inclusion, by itself, is insufficient to meaningfully affect the way that unit employees perceive their jobs or significantly affect employee attitudes concerning union representation." Though a different part of *Specialty Healthcare* was reversed by the Board, this part of it remains intact.

longer appropriate, requiring a showing of "compelling circumstances" not present here. *Cadillac Asphalt Paving Co*., 349 NLRB 6 (2007). I find, therefore, that the bargaining unit at the time Emerald purchased Mediclean was an appropriate unit and that the Respondent had an obligation to bargain with the Union.[54]

3. Initial terms and conditions

The Acting General Counsel asserts that the Respondent was required to bargain before setting its initial terms and conditions of employment.

As noted above, pursuant to *Burns*, successor employers are generally free to set initial terms and conditions of employment, including initial hiring terms. See *Canteen Co*., 317 NLRB 1052, 1053 (1995). There are some exceptions, however. See *Roman Catholic Diocese of Brooklyn*, supra (obligation attached when successor gave assurances to employees that it would employ them).

In *Love's Barbeque*, 245 NLRB 78 (1979), the Board found that the employer's unlawful discriminatory hiring practices were aimed at evading hiring any employees of the predecessor, and created an ambiguity making it impossible to determine whether that employer would have hired the predecessor's bargaining unit employees absent discrimination. The Board held that, under these circumstances, the successor employer may not unilaterally set the initial terms and conditions of employment. See also *Advanced Stretchforming International*, 323 NLRB 529, 530–531 (1997), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000), cert. denied 534 U.S. 948 (2001) (right to set initial terms is forfeited where the successor unlawfully refuses to hire the predecessor's employees). "In such cases, the successor must, as a matter of law, maintain the status quo by continuing the predecessor's *terms and conditions of employment* (as distinct from assuming an existing collective-bargaining agreement) until the parties have bargained to agreement or impasse. *Pressroom Cleaners*, 361 NRLB 643 (2014) (Emphasis in original, footnote omitted).

Any uncertainty about whether predecessor employees would have applied for and would have accepted employment are resolved against the wrongdoer whose conduct created those uncertainties. *Love's Barbeque*, see also *Systems Management*, 292 NLRB 1075, 1095 (1989), enfd. in rel. part 901 F.2d, rehearing and rehearing en banc denied (3d Cir. 1990); *Adams & Assocs., Inc. v. NLRB*, 871 F.3d 358 (5th Cir. 2017); *NLRB v. CNN America, Inc.*, 865 F.3d 740 (D.C. Cir. 2017).

[54] See *Vincent M. Ippolito, Inc*., 313 NLRB 715, 717 (1994)("The Act does not require the only appropriate or the most appropriate unit; the Act requires only that the unit be an appropriate unit."). It is clear the Respondent was aware of the Union and its parameters. (R Exh. 9; Tr. 387.) Even without the agreed-upon narrowing, the Respondent's concerns about including managers and supervisor are unwarranted, because the voluntary recognition group was limited to employees, and Section 2(3) of the Act excludes supervisors from the definition of "employee." Likewise, there is an absence of guards in the employee lists in evidence.

The Respondent's argument that Yalamanchi did not act exercise his own free will in signing the voluntary recognition agreement back in 2017 are not appropriately considered at this juncture, and in any event is unconvincing.

The Respondent's actions, detailed in the section discussing the discrimination allegations, make it impossible to determine whether a majority of the former Mediclean employees would have been hired absent the discriminatory termination/hiring scheme. As such, uncertainty is construed against the Respondent, and I find the Respondent was required to bargain with the Union before setting initial terms and conditions of employment.[55]

CONCLUSIONS OF LAW

1. The Respondent, Emerald Los Angeles, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Western States Regional Joint Board, Workers United/SEIU is a labor organization within the meaning of Section 2(5) of the Act.

3. The following constitutes a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All full time and regular part time employees employed by the Employer at its facility in Commerce, CA, excluding drivers, maintenance workers, managers, and supervisors.

4. The Respondent is a successor to Mediclean with respect to the obligation to recognize and bargain with the Union representing employees in the above unit, and therefore violated Section 8(a)(5) and (1) of the Act by its refusal to do so.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging Elida Arias, Guadalupe Garza, Maria Hernandez, Rosalia Munoz, Maria Dolores Sanchez, David Portillo, Elidia Lucia Aju Yac, Vanessa de Jesus, Teresa Figueroa, Blanca Fuentes, Mercedes Fuentes, Maria Teresa Garcia, Bertha Chiman Rodriguez, Concepcion Zarate, Lilli Lizarraga, Claudia Linarez, Teresa Sazo, Mabelin Ramirez, Esperanza Juarez, Vilma Platero, Everilda Lopez, Ada Soto, Ana R. Sandoval, Maria Linares, Virginia Geronimo, Angela Monzon, Andrea Cervantes, Maria Mercado, Rosalba Nolasco, Laura Gonzalez, Imelda Gonzalez, Elias Monroy, Lilianna Garcia, Yari Villalobos, Fany Reyes, Karla Gomez, Andi Lomeli, and additional employees not identified by name in the complaint, but who are members of a defined and easily identifiable class of employees, i.e., bargaining unit members Emerald summarily terminated, to ensure only a minority of its workforce would be comprised of bargaining unit employees in an attempt to evade its statutory obligation to recognize and bargain with the Union.

6. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in a hiring scheme intended to ensure only a minority of its workforce would be comprised of bargaining unit employees in an attempt to evade its statutory obligation to recognize and bargain with the Union.

[55] This includes bargaining over the hiring process, including the manner in which employees prove their authorization to work in the United States. See *The Ruprecht Company*, 366 NLRB No. 179 slip op. at 1 fn. 1 (2018) (finding that the employer's enrollment in E-Verify was a mandatory subject of bargaining, and noting that E-Verify affects the terms and conditions of employment).

7. The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider for rehire and refusing to rehire Ada Soto and additional employees not identified by name in the complaint, but who are members of a defined and easily identifiable class of employees, i.e. bargaining-unit members who applied for employment with Emerald and were not re-hired.

8. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union prior to discharging Elida Arias, Guadalupe Garza, Maria Hernandez, Rosalia Munoz, Maria Dolores Sanchez, David Portillo, Elidia Lucia Aju Yac, Vanessa de Jesus, Teresa Figueroa, Blanca Fuentes, Mercedes Fuentes, Maria Teresa Garcia, Bertha Chiman Rodriguez, Concepcion Zarate, Lilli Lizarraga, Claudia Linarez, Teresa Sazo, Mabelin Ramirez, Esperanza Juarez, Vilma Platero, Everilda Lopez, Ada Soto, Ana R. Sandoval, Maria Linares, Virginia Geronimo, Angela Monzon, Andrea Cervantes, Maria Mercado, Rosalba Nolasco, Laura Gonzalez, Imelda Gonzalez, Elias Monroy, Lilianna Garcia, Yari Villalobos, Fany Reyes, Karla Gomez, Andi Lomeli, and additional employees not identified by name in the complaint, but who are members of a defined and easily identifiable class of employees, i.e., bargaining unit members who were terminated after December 10, 2018.

9. The Respondent violated Section 8(a)(5) and (1) of the Act by implementing terms and conditions of employment, including engaging in a hiring scheme intended to ensure only a minority of its workforce would be comprised of bargaining unit employees in an attempt to evade its statutory obligation to recognize and bargain with the Union, without first notifying the Union and providing an opportunity to bargain.

10. The unfair labor practices described herein affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The ideal remedial order restores "the situation, as nearly as possible, to that which would have been obtained but for [the unfair labor practices]." *Pace Industries, Inc. v. NLRB*, 118 F.3d 585, 593 (8th Cir. 1997), citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

Having found the Respondent unlawfully refused to recognize and bargain with the Union as the exclusive bargaining representative of the bargaining unit consisting of "all full time and regular part time employees employed by the Employer at its facility in Commerce, CA, excluding drivers, maintenance workers, managers, and supervisors", the Respondent will be ordered to cease and desist from this activity and to immediately recognize the Union and, upon request, bargain with the Union. See *Caterair International*, 322 NLRB 64, 68 (1996).

"Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp*., 313 U.S. at 197. Restoration of the status quo ante, including reinstatement and backpay, is necessary when a new employer unlawfully discriminates in hiring to avoid a bargaining obligation. *Galloway School Lines, Inc*., 321 NLRB 1422, 1425 (1996); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1467 (9th Cir. 1997), enfg. 317 NLRB 1011 (1995), cert. denied. 522 U.S. 948 (1997).

Having found the Respondent engaged in the unlawful discriminatory terminations of Elida Arias, Guadalupe Garza, Maria Hernandez, Rosalia Munoz, Maria Dolores Sanchez, David Portillo, Elidia Lucia Aju Yac, Vanessa de Jesus, Teresa Figueroa, Blanca Fuentes, Mercedes Fuentes, Maria Teresa Garcia, Bertha Chiman Rodriguez, Concepcion Zarate, Lilli Lizarraga, Claudia Linarez, Teresa Sazo, Mabelin Ramirez, Esperanza Juarez, Vilma Platero, Everilda Lopez, Ada Soto, Ana R. Sandoval, Maria Linares, Virginia Geronimo, Angela Monzon, Andrea Cervantes, Maria Mercado, Rosalba Nolasco, Laura Gonzalez, Imelda Gonzalez, Elias Monroy, Lilianna Garcia, Yari Villalobos, Fany Reyes, Karla Gomez, Andi Lomeli, and additional employees not identified by name in the complaint, but who are members of a defined and easily identifiable class of employees, i.e., bargaining unit members summarily discharged, the Respondent shall be ordered to offer these employees immediate reinstatement to the same positions they held at the time they were discharged without prejudice to seniority or any other rights or privileges previously enjoyed, displacing if necessary, any workers subsequently hired, transferred, or reassigned. The reinstatement shall be subject to the employees' ability to present, within a reasonable time, the appropriate supporting documents proving legal immigrant status. *See Case Farms of North Carolina, Inc*., 353 NLRB 257, 263 (2008) (two-member decision), enfd. mem. per curiam 2010 WL 1255941 (D.C. Cir. Mar. 3, 2010).[56] The Respondent shall make the employees whole for any loss of pay and any benefits in the manner described below regarding backpay.

The reinstatement of discharged employees is also an appropriate remedy for its failure to provide notice to the Union and provide an opportunity to bargain. Restoration to the status quo ante is presumptively appropriate to remedy unlawful unilateral changes. *Southwest Forest Industries*, 278 NLRB 228 (1986), enfd. 841 F.2d 270 (9th Cir. 1988). When bargaining unit work has unilaterally and unlawfully been removed, restoration of the work to the bargaining unit is the appropriate remedy, unless the employer demonstrates that restoration would be unduly burdensome. See *Vista del Sol Healthcare*, 363 NLRB No. 135, slip op. at 1 (2016). No such showing has been made, and I therefore find restoration to the status quo ante by reinstatement is the appropriate remedy.

Having found the Respondent failed to notify the Union about or offer an opportunity to bargain over the terminations of Elida Arias, Guadalupe Garza, Maria Hernandez, Rosalia Munoz, Maria Dolores Sanchez, David Portillo, Elidia Lucia Aju Yac, Vanessa de Jesus, Teresa Figueroa, Blanca Fuentes, Mercedes Fuentes, Maria Teresa Garcia, Bertha Chiman Rodriguez, Concepcion Zarate, Lilli Lizarraga, Claudia Linarez, Teresa Sazo, Mabelin Ramirez, Esperanza Juarez, Vilma Platero, Everilda Lopez, Ada Soto, Ana R. Sandoval, Maria Linares, Virginia Geronimo, Angela Monzon, Andrea Cervantes, Maria Mercado, Rosalba Nolasco, Laura Gonzalez, Imelda Gonzalez, Elias Monroy, Lilianna Garcia, Yari Villalobos, Fany Reyes, Karla Gomez, Andi Lomeli, and additional employees not identified by name in the complaint, but who are members of a defined and easily identifiable class of employees, i.e., bargaining unit

[56] There is no reason to dispute the Respondent's contention that it subjects its employees to E-verify, and the Board recognizes that employers must comply with the Immigration and Control Act of 1986. Because the employees in the bargaining-unit were not previously verified, I find the Respondent has a legitimate reason to believe that re-employing some of the employees could put them in violation of IRCA. However, the manner in which verification is accomplished is subject to bargaining. *See Frontier Communications Corp*., 370 NLRB No. 131 (2021); *The Ruprecht Company*, supra.

employees discharged after December 10, 2018, the Respondent shall be ordered to offer these employees immediate reinstatement to the same positions they held at the time they were discharged without prejudice to seniority or any other rights or privileges previously enjoyed, displacing if necessary, any workers subsequently hired, transferred, or reassigned. The reinstatement shall be subject to the employees' ability to present, within a reasonable time, the appropriate supporting documents proving legal immigrant status. The Respondent shall make them whole for any loss of pay and other benefits in the manner described below regarding backpay.

Having found the Respondent refused to rehire or consider for rehire Ada Soto and additional employees not identified by name in the complaint, but who are members of a defined and easily identifiable class of employees, i.e. bargaining-unit members who applied for employment with Emerald and were not re-hired, these individuals are entitled to the remedy for unlawful refusal to hire—instatement and backpay—which subsumes the remedy for the Respondent's unlawful refusal to consider them for hire. *Jobsite Staffing*, 340 NLRB 332, 333 (2003). The Respondent shall offer them full instatement in the positions for which they applied absent the Respondent's unlawful discrimination, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges they would have enjoyed, discharging if necessary any employees hired in their place. The instatement shall be subject to the employees' ability to present, within a reasonable time, the appropriate supporting documents proving legal immigrant status. The Respondent shall make them whole for any loss of pay and any other benefits in the manner described below regarding backpay.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.[57] The Respondent shall also compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each of them. *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016).

The Respondent shall file with the Regional Director for Region 21 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award. *Cascades Container Board*, 370 NLRB No. 76 (2021). In accordance with *King Soopers, Inc*., 364 NLRB 1153 (2016), enfd. 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall also reimburse employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

[57] The extent to which any award of backpay is impacted by *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), is properly addressed at the compliance stage if necessary. See *Tuv Taam Corp*., 340 NLRB 756, 760-761 (2003).

Having found the Respondent unlawfully refused to notify and offer the Union an opportunity to bargain prior to its imposition of initial terms and conditions of employment, the Respondent shall be ordered to, upon request by the Union, rescind these initial terms and conditions of employment and provide the Union an opportunity to bargain over them. At the request of the Union, the Respondent shall rescind any departures from terms and conditions of employment that existed immediately prior to Emerald's takeover of predecessor Mediclean's operation, retroactively restoring preexisting terms and conditions of employment until it negotiates in good faith with the Union to an agreement or to impasse. *Pressroom Cleaners*, supra. The Respondent is not required or authorized to rescind any improvements in the terms and conditions of employment unless requested to do so by the Union.

I will order that the employer post a notice in English and Spanish in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase.

The Respondent has requested a notice reading, arguing that the Respondent announced its purchase of Mediclean in a facility-wide meeting on December 10, 2018, and the Respondent acknowledges that when it needs to get the word out to its workers, it does so in group meetings. The Board has recognized that a notice reading may be warranted "where the violations are so numerous and serious that the reading aloud of a notice is considered necessary to enable employees to exercise their Section 7 rights in an atmosphere free of coercion, or where the violations in a case are egregious*." Postal Service*, 339 NLRB 1162, 1163 (2003). By imposing this remedy the Board can assure a respondent's "minimal acknowledgment of the obligations that have been imposed by the law. . . . The employees are entitled to at least that much assurance that their organizational rights will be respected in the future." *Federated Logistics*, 340 NLRB 255, 258 fn. 11 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005), quoting *Blockbuster Pavilion*, 331 NLRB 1274, 1276 fn. 17 (2000). Here, immediately upon assuming operations and after assuring employees nobody would be fired, the Respondent conducted a mass discharge. The Respondent continued its course of discharging bargaining unit employees while hiring external employees, and engaged in yet another mass discharge, while ignoring any bargaining obligation. See *Greenbrier Rail Services*, 364 NLRB No. 30 (2016). Because of the Respondent's egregious violations coupled with its lack of regard for its obligations to the Union under the Act, I find a notice reading, in English and Spanish, is warranted. [58]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[59]

[58] The proposed remedy section of the Acting General Counsel's closing brief requests a broad remedial order, but does not provide any justification. (GC Br, 70). Given that the Respondent is not a recidivist offender, I find a notice reading is a sufficient remedy.

[59] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Emerald Los Angeles, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Refusing to recognize and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the following bargaining unit: "All full time and regular part time employees employed by the Employer at its facility in Commerce, CA, excluding drivers, maintenance workers, managers, and supervisors".

b. Discriminating against bargaining unit employees by discharging them and refusing to hire them because of their Union membership, affiliation and support, as part of a hiring scheme designed to ensure only a minority of its workforce would be comprised of bargaining unit employees in an attempt to evade its statutory obligation to recognize and bargain with the Union.

c. Unilaterally changing the terms conditions of employment of the bargaining unit employees, including but not limited to discharging employees, refusing to hire employees, and changing the process for hiring employees, without first notifying the Union and giving them an opportunity to bargain.

d. In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

a. Notify the Union in writing that it recognizes them as the exclusive representative of its bargaining unit employees under Section 9(a) of the Act and that it will bargain with it concerning terms and conditions of employment for employees in the unit.

b. Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the unit concerning terms and conditions of employment and if an understanding is reached, embody the understanding in a signed agreement.

c. At the request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to Emerald's takeover of predecessor Mediclean's operation, retroactively restoring preexisting terms and conditions of employment until it negotiates in good faith with the Union to an agreement or to impasse.

d. Within 14 days from the date of the Board's Order, offer reinstatement to Elida Arias, Guadalupe Garza, Maria Hernandez, Rosalia Munoz, Maria Dolores Sanchez, David Portillo, Elidia Lucia Aju Yac, Vanessa de Jesus, Teresa Figueroa, Blanca Fuentes, Mercedes Fuentes, Maria Teresa Garcia, Bertha Chiman Rodriguez, Concepcion Zarate, Lilli Lizarraga, Claudia Linarez, Teresa Sazo, Mabelin Ramirez, Esperanza Juarez, Vilma

Platero, Everilda Lopez, Ada Soto, Ana R. Sandoval, Maria Linares, Virginia Geronimo, Angela Monzon, Andrea Cervantes, Maria Mercado, Rosalba Nolasco, Laura Gonzalez, Imelda Gonzalez, Elias Monroy, Lilianna Garcia, Yari Villalobos, Fany Reyes, Karla Gomez, Andi Lomeli, and any additional affected employees to their former jobs, or if those jobs no longer exist, to a substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. The reinstatement shall be subject to the employees' ability to present, within a reasonable time, the appropriate supporting documents proving legal immigrant status.

e. Within 14 days from the date of the Board's Order, offer instatement to Ada Soto and other affected employees into the positions for which they applied, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges they would have enjoyed, discharging if necessary any employees hired in their place. The instatement shall be subject to the employees' ability to present, within a reasonable time, the appropriate supporting documents proving legal immigrant status.

f. Make the employees who were reinstated or instated whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision. This includes compensating them for the adverse tax consequences, if any, of receiving a lump-sum backpay award, reimbursing them for any search-for-work and interim employment expenses, and filing with the Regional Director for Region 21 a copy of each affected employee's corresponding W-2 form(s) reflecting his or her backpay award.

g. Within 14 days from the date of the Board's order, remove from its files any reference to the unlawful terminations of bargaining unit employees, and notify these employees in writing that this has been done and that the terminations will not be used against them in any way.

h. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

i. Within 14 days after service by the Region, post at its facility in Commerce, California copies of the attached notice marked "Appendix"[60] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where

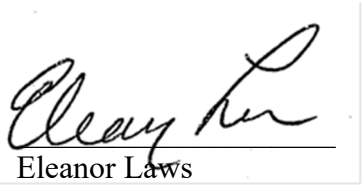
60 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 10, 2018.

j. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 22, 2021



Eleanor Laws
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Western States Regional Joint Board, Workers United/SEIU or any other union.

WE WILL NOT refuse to consider you for rehire or refuse to rehire you because of your support for the Western States Regional Joint Board, Workers United/SEIU or any other union.

WE WILL NOT unilaterally, without notice and an opportunity to bargain with the Western States Regional Joint Board, Workers United/SEIU, make and implement changes to your terms and conditions of employment.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full time and regular part time employees employed by the Employer at its facility in Commerce, CA, excluding drivers, maintenance workers, managers, and supervisors.

WE WILL, within 14 days from the date of this Order, offer Elida Arias, Guadalupe Garza, Maria Hernandez, Rosalia Munoz, Maria Dolores Sanchez, David Portillo, Elidia Lucia Aju Yac, Vanessa de Jesus, Teresa Figueroa, Blanca Fuentes, Mercedes Fuentes, Maria Teresa Garcia, Bertha Chiman Rodriguez, Concepcion Zarate, Lilli Lizarraga, Claudia Linarez, Teresa Sazo, Mabelin Ramirez, Esperanza Juarez, Vilma Platero, Everilda Lopez, Ada Soto, Ana R. Sandoval, Maria Linares, Virginia Geronimo, Angela Monzon, Andrea Cervantes, Maria Mercado, Rosalba Nolasco, Laura Gonzalez, Imelda Gonzalez, Elias Monroy, Lilianna Garcia, Yari Villalobos,

Fany Reyes, Karla Gomez, Andi Lomeli, and any additional affected employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Elida Arias, Guadalupe Garza, Maria Hernandez, Rosalia Munoz, Maria Dolores Sanchez, David Portillo, Elidia Lucia Aju Yac, Vanessa de Jesus, Teresa Figueroa, Blanca Fuentes, Mercedes Fuentes, Maria Teresa Garcia, Bertha Chiman Rodriguez, Concepcion Zarate, Lilli Lizarraga, Claudia Linarez, Teresa Sazo, Mabelin Ramirez, Esperanza Juarez, Vilma Platero, Everilda Lopez, Ada Soto, Ana R. Sandoval, Maria Linares, Virginia Geronimo, Angela Monzon, Andrea Cervantes, Maria Mercado, Rosalba Nolasco, Laura Gonzalez, Imelda Gonzalez, Elias Monroy, Lilianna Garcia, Yari Villalobos, Fany Reyes, Karla Gomez, Andi Lomeli, and any additional affected employees whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days of the Board's Order, offer Ada Soto and other affected employees full instatement into the positions for which they applied absent the Respondent's unlawful discrimination, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges they would have enjoyed, discharging if necessary any employees hired in their place.

WE WILL make Ada Soto and other affected employees whole for any loss of earnings and other benefits resulting from our failure to rehire them, less any net interim earnings, plus interest compounded daily.

WE WILL also make these employees whole for any reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate these employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each of them.

WE WILL file with the Regional Director for Region 21 a copy of each affected employee's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges of the employees named above, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful actions will not be used against any of them in any way.

Emerald Los Angeles, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
312 N. Spring Street, Suite 10150, Los Angeles, CA 90012-4701, (213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/21-CA-233024 by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5184.